

A CODE OF MUSLIM PERSONAL LAW

DR. TANZIL-UR-RAHMAN
M.A., LL.B., PH.D.,
ADVOCATE,
SUPREME COURT AND HIGH COURT

A CODE OF MUSLIM PERSONAL LAW

VOLUME I

Containing laws of

Marriage, Dower, Maintenance, Divorce, Dissolution of Marriage, Khul'a, Mubārāt, 'Iddat, Parentage, Legitimacy and Custody of Children etc. Codified and Re-stated in the light of the Holy Qur'ān, Sunnah and authentic books of *fiqh*

By

Dr. TANZIL-UR-RAHMAN

M. A., LL. B., Ph. D.,

Advocate-Supreme Court of Pakistan



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PREFACE

Nothing in the world is perfect and no word is the last word in any branch of knowledge, least of all in the study and practice of law. The present work (Volume I) is a compendium of Muslim Personal law which represents an attempt to codify the Islamic Laws relating to marriage, divorce, dissolution of marriage, dower, wife's maintenance, parentage and legitimacy, custody of children and maintenance of children, parents and other relatives, whereas the laws relating to gift, waqf, will and inheritance will be dealt with in volume II. What I can at best aspire is to suggest to the legislators a reasonably comprehensive formulation of the law nearest to the position taken by Muslim doctors of *fiqh* on the point covered by draft section.

2. The work is based on the Holy Qur'ān and the Sunnah and the original Arabic text-books of acknowledged authority. It gives copious references so that a searching reader may be in a position to go direct to the original sources without much inconvenience and find for himself the details of relevant law on the subject, if needed. It refers to the Rules of Conduct of nearly all the recognised Schools of Law in Islam, e. g. *Ḥanafī*, *Mālikī*, *Shāfi'ī*, *Ḥanbalī*, *Zāhirī* and *Shi'ah*. The current laws as in force in various Muslim countries including Pakistan have also been stated on the subject, wherever available.

3. This work, as an essential requisite for a useful study, has been classified into chapters. Each chapter has been divided into a number of sections in a codified form, followed by full commentary in a systematic manner to help the readers in understanding and grasping relevant provision of law in a comparative, analytical and juristic manner. I have also indicated the reason for the adoption of the view which I have tried to cover by the text of each section. Besides, there have been suggested separately amendments in the Pakistan law in force, wherever it is found in conflict with the Holy Qur'ān and the Sunnah. Let it, however, be clarified that it is not an exclusive authority in the matter codified. It has no pretensions to be the last word. The Courts are free to form their own opinions as a result of their study of the law. This work may be used as a guide to them.

4. Since it is essential for the proper study of a subject, such as law, that the reason of the rule may be clearly brought out so as to justify the maxim, "He knoweth not the law who knoweth not the reasons thereof," the comments that follow each section discuss the verdicts and opinions of the various Imams and Jurists, together with the reason for the position they have adopted, to make the work of special value and advantage to all concerned.

5. It is hoped that this compendium will be useful to the Bench and the Bar and will stimulate interest in research in Islamic Law. The work, to quote *Twenty Years of Pakistan*, "is the first of its kind in the sub-continent" in material, treatment and style and can be safely relied upon as a work of authenticity in Pakistan and elsewhere.

6. Notwithstanding the utmost exertions it is just possible that some printing errors may still be found there but the nature of work and my professional pre-occupations will, perhaps, be considered sufficient ground for indulgence.

7. I must now express my heartfelt thanks and gratitude to my dear old friend and for sometime my colleague in profession, late Syed Akhtar Hasan, (May his soul rest in peace). Without his assistance and encouragement this work, perhaps, would not have seen the light of day. I must also thank my esteemed friend Mr. Mehdi Ali Siddiqi, retired Additional District Judge and ex-Editor Muslimnews International for rendering his valuable assistance in reading through the entire typed manuscript of this volume and suggesting some very useful improvements. It was also very kind of him that he took upon himself the onerous task of checking press-proofs for which I am obliged to him. I must also be thankful to Mr. Laiq ud-Din Siddiqi of Industries Printing Press for his cooperation.

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REFERENCE BOOKS

Abdullah b. Maftāh, Shaykh (d. 877 A. H.) : *Al-Muntazi 'al-Mukhtār*, Cairo, 1332 A. H.

Abdul Rahim : *Muhammadan Jurispundence*, Madras, 1911.

Abul A'la Maududi : *Rasā'il wa Masā'il*, Lahore, 1967.

Abul A'la Maududi : *Tarjumān al-Qur'ān*, Muharram, 1356 A. H.

Abul Barkat Mujid al-Din (d. 652 A. H.) : *Al Muḥarar fil Fiqh al-Ḥanbalī*, Matba' al-Sunnat al-Muhamadiyah, Cairo, 1950.

Abu Da'ūd : *Al-Sunan*, Karachi, 1369 A. H.

Abu Sa'ūd (d. 951 A. H.) : *Tafsīr*, Maktaba al-Hussainyah, Cairo, 1347 A. H.

Abu Ubaydullah : *Kitab Rahmat al Uummah fi Ikhtilaf al-A'immaḥ* (on margin of *Al-Mīzān al-kubrā*), Cairo.

Abū Zuhra : *Aḥwal al-Shakhsiyyah* Cairo, 1957 A. D.

Ahmed b. Hanbal : *Al-Musnad*, Cairo, 1313 A. H.

Al-Ābi 'Abd al-Samī' : *Jawahar al Aklīl*, *Sharḥ Al-Mukhtāsar*, Khalil, Cairo, 1366 A. H.

Al-Ālūsī, Sayyid Maḥmūd (d. 1270 A. H.) : *Rūḥ al-Ma'āni*, Cairo.

Al-Atasī : *Sharḥ al-Mujalla*, Hims, 1349 A. H.

Al-Asqalanī Ibn Hajar : *Bulūgh al-Marām*, (Arabi-Urdu) Karachi.

Al-Baghawī : *Mishkāṭ*, Karkhana Tijārat Kutub, Karachi.

Al-Baydāwī : *Anwār al-Tanzil* (known as *Baydāwī*), Muṭtabā'i Press, Delhi, 1326 A. H.

Al-Bayhaqī : *Kitab-al-Sunan al-kubra*, Hyderabad Deccan, 1353 A. H.

Al-Bukhārī : *Al-Sahīḥ*, Karachi & Muṭtabai Press, Delhi.

Al-Dār Qutni (d. 385 A. H.) : *Al-Sunan*, Delhi 1310 A. H. and Hejāz.

Al-Ghazzali (d. 505 A. H.) : *Al-wajiz fi'l fiqh al-Shafi'i*, Cairo, 1317 A. H.

Al-Halbi, Ibrahim b. Muhammad (d. 956 A. H.) *Majma' Al-Abḥur* on the margin of *Majma' al-Anhur*, Cairo, 1327 A. H.

Al-Haskafī, 'Alā al Dīn (d. 1088 A. H.) : *Al-Durr al-Mukhtar*, on the margin of *Radd al-Muhtār*, Cairo, 1252 A. H.

Al-Hasnain, Muḥammad : *Asl Al-Shī'ah wa Usuluhā*, Iran.

Al-Hillī, Najm al-Din (d. 474 A. H.) : *Sharā'i'-al-Islam*, Beirut and Tehran edition, 1377 A. H.

Ali Al-khafīf : *Furq al-Zawāj*, Abidin, 1958.

Al-Maqhrbi, Muhammad b. Abdul Rahman (d. 954 A. H.) : *Muwahib al-Jalīl*, Cairo, 1329 A. H.

- Al-Maqdisi, Shaarf al-Din (d. 968 A. H.) *Al-Iqna*, Cairo.
- Al-Jassās (d. 370 A. H.) : *Aḥkām al-Qur’ān*, Matba ‘al-Āstānah, 1328 A. H., Cairo, 1335 A. H.
- Al Jazarī, Abdul Rahman: *Kitāb al-Fiqh ‘all Madhāhib al-Arba‘h*, Cairo, 1355 A. H., 1936 A. D.
- Al-khatib Muhammad al-Sharbīnī (d. 977 A. H.) *Mughni al-Muḥtaj*, Cairo, 1933 A. D.
- Al-kasānī, ‘Ala al Din, Imam (d. 587 A. H.); *Badāi‘ al-Ṣanāi‘*, Cairo, 1328 A. H.,
- Al-Mardāwi : *Al-Insāf*, Cairo.
- Al-Marghinānī, Burhan -al Din : *Al-Hidāyah*, Delhi & Karachi.
- Al-Mīdānī Abdul Ḡhanī : *Al-Lubāb*, Commentary of Al-Qudūrī’s *Al-Mukhtasar*, Cairo, 1383 A. H.
- Al-Nasafī, Mahmūd : (d. 710 A. H.) *Al-kanz al-Daqā’iq*, Deoband and Mujtabai Press, Delhi.
- Nasafi Abdullā b. Aḥmad b. Mahmūd (d. 710 A. H.) : *Madārik al-Tanzil* (known as *Tafsīr Nasafi*), Cairo.
- Al-Qudurī, Abul Hasan (d. 428 A. H.) : *Al-Mukhtasar*, Qur’ān Mahal, Karachi.
- Al-Qurtubi Abū ‘Abdullah Muhammad Al-Ansari: *Tafsīr Jami ‘ōl-Ahkam al-Qur’ān*, Cairo, 1936 A. D.
- Al-Ramlī, Muhammad b. Ahmad (d. 1004 A. H.) : *Nihayat ol-Muhtaj* Cairo, 1292 A. H.
- Al-Rāzī, Fakhr al-Dīn : *al-Tafsīr al-Kabir*, Cairo, 1938 A. H., 1357 A. H.
- Al-Saḥnūn : (d. 240 A. H.) *Al-Mudawwanah al-kubrā* (Malikī fiqh); Cairo, 1323 A. H.
- Al-Sarakhsi, Shams al-Din : (d. 482 A. H.) *Al-Mabsūt*, Cairo, 1324 A. H.; *Al-Nukat*, Commentary on Al-Shaybanī’s “*Al ‘Ziyādāt*” Hyderabad Deccan, 1328 A. H.
- Al-Shāfi‘ī, Muhammad b. Idris (d. 204 A. H.) : *Al-‘Umm*, Cairo, 1381 A. H.; *Al-Risālah fi ‘Usul al-fiqh wal Ḥaḍith*, Cairo; *Al-Wajīz*, Cairo.
- Al-Shawkani, Muhammad b. ‘Ali : *Irshād al-Fuḥūl*, Cairo, 1356 A. H. 1937 A. D.
- Al-Shī‘rani, Abdul Wahāb: *Al-Mizōn al-Kubrā*, Cairo, 1359 A. H./1940 A. D.
- Al-Shīrazī, Abū Ishāq Ibrāhīm al-Firozābadi (d. 476 A. H.) : *Al-Muhadḍab*, Maktabah ‘Isa, al-Babi, Cairo, 1343 A. H.
- Al-Tabri (d. 310 A. H.), *Tafsīr al-Tabrī* Cairo, Matba‘ al-Amīriyah, 1323 A. H.
- Al-Trimidhi : *Al-Jāmi‘*, Cawnpore & Karkhana Tijarat Kutub, Karachi.
- Al-Tūsī : *Mukhtalif al-Shī‘ah*, Matba‘ al-Hajar, Iran.

- Al-Tūsi, Muhammad b. al-Hasan (d. 460 A. H.) : *Al-Istibrār*, Najaf.
- Al-Zamakhsharī, Mahmūd b. ‘Umar (d. 538 A. H.) : *Al-Kashāf ‘an Ghawamiḍ al-Tanzil*, Cairo, 1354 A. H.
- Al-Zaylī (d. 743 A. H.) : *Tabyīn al-Haqā’iq*, Matba‘ al-Amīriyah, Cairo.
- Al-Zaylī : *Nasab al-Rāyah li Ahadīth al-Hidāyah*, Dabhel, 1357 A. H.
- Al-Zubaydi : *Tāj al-‘U’rūs*, Beirut.
- Ashraf ‘Alī Thānwī, Maulānā (d. 1943 A. D.) : *Al-Hilatūl Najizah*, Karachi.
- Charles Hamilton : *Hedayā (strictly, al-Hidaya) (Trans.)* Lahore, 1960.
- Dāmād Afandī : *Majma‘al Anhur*, Cairo, 1327 A. H.
- Dār Qutnī : *Al-Sunan*, Hejaz, 1966 A. D.
- Hākim : *Al-Mustarak*, Hyderabad Deccan, 1340 A. H.
- Ibn-al-‘Ābidin, Muhammad Amin (d. 1252 A. H.) Cairo 1318, 1327 & 1356 A. H. edns.
- Ibn al-‘Arabi : *Ahkam al-Qur’ān*, Cairo, 1957 A. D.
- Ibn al-Hajar ‘Asqalānī, (d. 852 A. H.) : *Fath al-Bārī* Commentary on *Sahīh al-Bukhārī*, Cairo, 1378 A. H./1959 A. D.
- Ibn al Kathīr (d. 744 A. H.) : *Tafsīr*, Cairo.
- Ibn al-Qayyim, Hafiz : (d. 751 A. H.) : *Ighathatūl Lahfan*, Cairo.
- Ibn al-Qayyim, Hafiz : *Zād al-Ma‘ād*, Cairo, 1324 & 1369 A. H., edns.
- Ibn al-Turkmanī (d. 745 A. H.) *Jawahar al-Naqi*, on the margin of *Al-Sunan al-Kubra*; Hyderabad Deccan.
- Ibn Athīr : *Al-Nihāyah fi Gharīb al-Hadīth*, Cairo, 1311 A. H.
- Ibn Habbān; *Tafsīr al-Muhit*, Cairo.
- Ibn Hazm, Imam Abu Muhammad (d. 456 A. H.) : *Al-Muḥṭā*, Cairo, 1353 A. H.
- Ibn al-Humam : Kamal al-Din (d. 861 A. H.) *Fath al-Qadir*, Cairo, 1356 A. H.
- Ibn Majah : *Al-Sunan*, Lucknow & Karachi.
- Ibn Manzūr : *Lisān al-‘Arab*, Cairo.
- Ibn Nujaym : *Al-Baḥr al-Rā‘iq*, Cairo, 1311 A. H.
- Ibn Qudamah (d. 620 A. H.) : *Al-Mughnī*, Cairo, 1367 A. H.
- Ibn Rushd, Imam Abu al-Walid Muhammad b. Ahmed Al-Qurtubī (d. 594 A. H.) : *Bidāyat al-Mujtahid*, Cairo, 1369 A. H.
- Ibn Taymiyah (d. 728 A. H.) : *Al-Ikhtiyār al-Ilmiyyah*, Cairo: *‘Ilam al-Muwaqqi‘īn*, Damascus; *Fatāwā*, Sa‘udi Arabia.
- Malik b. Anas : *Muwatta‘a* (with Commentary by Zarqānī), Cairo, 1382 A. H. and Karachi edn.
- Maqbūl Ahmed Dehlavī, Hāfiz : *Tafseer-al-Qur’ān*, Delhi.
- Mawdūd (d. 683 A. H.) : *Al-Ikhtiyar fi ta‘til al-Mukhtar*, Cairo, 1370 A. H.

- Mudawwanah al-Aḥwāl al-Shakhsiyyah*, Morocco.
- Mufti Muhammad Shafī' : *Jawāhar al-Fiqh*, Karachi 1975.
- Muhammad b. Ahmad; *Jawāhar al-Uqūd*, Cairo, 1374 A. H.
- Muhammad al-Shaybānī, Imam : *Muwaṭṭa*, Karachi.
- Muhammad Amīn : *Minḥatul Khaliq*, (on the margin of *Bahr al-Rā'iq*, Cairo.
- Muhammad Idrīs, Shaykh : *Al-Sarā'ir*, Iran.
- Muhammad Kazim Tabātabā'ī : *Al-Urwatul Wuthqa*, Baghdad, 1330 A. H.
- Muhammad b. Maflah : *Al-Furū'*, (Hanbali *fiqh*), Cairo.
- Mujalla al-Aḥwāl al-Shakhsiyyah*, Tunisia.
- Mulla Miskin : *Fath al-Mu'in*, on the margin of *Sharh Kanz al-Daqā'iq*, Dehli.
- Mulla Nizām Burhanpuri : *Fatāwa 'Ālamgiriyyah*, Cawnpur, & Deoband edns.
- Murtāḍā (d. 840 A. H.), *Al-Bahr al-Dhakhār*, Cairo, 1948.
- Muslim : *Ṣaḥīḥ*, (with Commentary by Nawawī), Cairo.
- Mustafa Al-Sabba'ī : *Sharḥ al-Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria.
- Nasa'ī : *Al-Sunan*, Majtaba'ī, Delhi & Karachi.
- Qāḍi Ahmad b. Qāsim al-Ghassī : *Al-Tajal-Madḥahlb*, (Zaydiyyah *fiqh*), Cairo, 1938.
- Qāḍi Khan : *Fatāwa*, Mustafā'ī Press, Delhi.
- Qadrī Pasha : *Al-Aḥkām al-Shar'iyyah fil Aḥkām al-Shakhsiyyah*, Cairo.
- Qanūn al-Aḥwāl al-Shakhsiyyah*, Iraq.
- Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria.
- Qanūn Al-Haqūq a. i. 'Āilah*, Jordan.
- Rāghib al-Iṣfahānī (d. 502 A. H.) : *Mufradāt al-Qur'ān*, (Urdu Tr.), Lahore.
- Sharḥ al-Kharshī* (on Khulī's *Al-Mukhtār*), Cairo, 1317 A. H.
- Sharḥ Al-Dasūtī* on Khalil's *Al-Mukhtasar* (on Mālīkī *fiqh*), Cairo.
- Syed Amir Ali, Justice : *Mohammadan Law*, Lahore, 1965.
- Syed Amīr 'Alī Mawlāna : (d. 1938 A. D.), *Ayn ul-Hidayah*, Lucknow.
- Tahzib al-Tahzib* : Hyderabad Deccan, 1326 A. H.
- Tanzilur-ur-Rahmān, Dr. : *Majmū'ah Qawanīn-i-Ialam*, Volumes I, II, III, IV & V, Islamic Research Institute, Islamabad, 1965, 1967, 1969. 1973 & 1978.
- Tanzil-ur-Rahman, Dr. : *Qānūnī Lughat* (Law Lexicon) 3rd. ed. Federal Law Publications, Lahore, 1976.
- Ubaydullah b. Mas'ūd : *Sharḥ al-Wiqāyah*, Delhi, 1927.
- 'Umar Abdullah : *Al-Aḥkām al-Sharī'ah al-Islāmiyyah fil Aḥwāl-al-Shakhsiyyah*, Cairo.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allōh, the Beneficent, the Merciful

A CODE OF MUSLIM PERSONAL LAW

LAW OF MARRIAGE

CHAPTER—I

Applicability and Definitions

Section 1. This Code may be cited as “A Code of Muslim
Title Personal Law”.

Section 2. (a) This “Ccde of Muslim Personal Law” is
Extent applicable to all the Muslims and to such non-
& Muslim females with whom the marriage of Mus-
Application lim males is permissible and who are validly
married to Muslim males under the *Sharī‘ah*, save as other-
wise expressly provided.

(b) In case of inconsistency or contradiction arising between the law codified herein and the “law for the time being in force” the latter shall prevail, till the same is replaced by suitable amendments and brought in accordance with this Code.

(c) If, in the process of consideration of a matter under the law for the time being in force or under the Law codified herein, no Islamic mandatory provision is available, recourse shall be had to the preferred opinion of the *fuqahā* (jurists), upon which there is an *Ijmā‘*.

(d) In the event of non-availability of any provision in the original sources of “Islamic *Sharī‘ah*,” i. e. the Qur‘ān and the *Sunnah*, or the preferred opinion of the *fuqahā* upon

which there is an *Ijmā'*, order shall be passed in the light of the prevailing practice ('*Urf*) and judicial precedents which are not repugnant to the Injunctions of Islam.

(e) If having recourse to any of the above enumerated means is not possible, the courts shall resort to *Ijtihād*. *Ijtihād* must be based on the Qur'ān and the *Sunnah* and kept confined within the limits of the recognized principles of Islamic Jurisprudence. ('*Usūl al fiqh*).

COMMENTARY

Islamic Law so far as it relates to matrimonial causes and family relations applies to all Muslims and to those non-Muslim females who are married to Muslims, barring certain laws such as the Islamic Law of Inheritance, where Islam is a condition precedent to inherit the estate of a deceased Muslim. The Islamic Municipal Law, in its public domain, however, applies to all citizens of a Muslim State including those foreigners who have entered the Dār al-Islām for temporary stay. In other words, the application of Islamic Public Law to non-Muslims, in general, is territorial.

Lex Domicilii and Islam :

Islam ordains a common code of law for all Muslims, as it considers a Muslim to be a citizen of all Muslim States and not of the particular Muslim country where he resides. In other words, it lays down that all Muslim countries shall be governed by the same laws. Islam does not recognise any geographical or cultural barriers between two Muslim countries. The concept of "Domicile" which is the offspring of the modern concept of "Nationalism" is foreign to Islam. A Muslim living in any Muslim country is in law entitled to enjoy the same rights and privileges as are enjoyed by the local Muslims. A Muslim, whether by birth or by subsequent adoption of the faith, is governed only by the Islamic Law wherever he or she may be living and wherever he or she may go and reside. A Muslim, thus, is not governed under the provisions of Islamic Law by *lex domicilii*, that is, the law of the country of which he is a permanent citizen or where he intends to settle permanently. For instance, if an 'Arab or a Pakistani Muslim takes up his domicile in England, then, according to Muslim Law, he shall still be governed by his personal law and not by the English law, because the Prophet (peace be upon him) is reported to have said : *الاسلام يعلو ولا يعلى* (Islam prevails and is not prevailed upon).

The same result shall follow if an English man or woman embraces Islam in England, he or she shall, under Islamic Law, immediately on

conversion, become subject to Islamic personal law, without any regard to his or her domicile or the law of the country of his or her domicile.

The applicability of Muslim personal law in its extent and scope is not limited to Muslims alone, but it embraces in its fold such *kitābiyyah* women also who are in the wedlock of Muslims. That is to say, a *kitābiyyah* wife of a Muslim shall also be governed by Muslim law in the matrimonial causes and family relations, save as otherwise expressly provided.

Sources of Islamic Law :

There are a number of sources of Islamic Law. The Qur'ān and the *Sunnah* are the primary sources, whereas the *Ijmā'*, the *Qiyās* or *Ijtihād* and '*Urf* (custom) are merely the secondary sources.

I. The Qur'ān :

The Qur'ān is the original, primary, basic and most fundamental source of the Islamic *Shari'ah*. It is the Last Book of His revelations for entire humanity. Hence, its teachings shall ever remain the fountain of all guidance for all times, ages and people. The principles and guidelines of the Qur'ān, its biddings and commandments are firm and eternal, though their interpretations shall continue to be made within the four corners of the *Sunnah* of the Prophet (peace be upon him) and his revered Companions, *Siḥābah*.

II. The Sunnah :

The *Sunnah* or *Sunnat* is the second important source of Islamic Law. It covers the words and acts of the Prophet himself that he did speak and perform. It includes the words and acts of his Companions in his presence or knowledge, which he did not disapprove.

Relationship between the Qur'ān and the Sunnah :

The commandments of Allāh which reached human beings through the Prophet, Muhammad (peace be upon him) may be classified thus :

First, as the commandment which is firm one in the Qur'ān (*nass*) and has no scope for dual interpretation.

Second, as the commandment of Allāh indicated precisely in the Qur'ān but its further elucidation is made in the words and acts of the Prophet.

Third, as the commandment which has not been specifically prescribed in the Holy Qur'ān but by giving a guide-line in the words :

“So take what the Apostle assigns to you, and deny yourself that which he withholds from you;”¹

¹Al-Qur'ān, *Sūrah Al Hashr* (The Gathering), LIX : 7,

”وما آتاكم الرسول فخذوه وما نهاكم عنه فانتهوا“

“He who obeys the Apostle, obeys Allāh;”²

Allāh has made it obligatory to abide by the dictates of the Prophet and thereby the foundation of relationship between the Qur’ān and the *Sunnah* of the Prophet was laid.

The *Fourth* includes all the obligatory commandments and directives arrived at by *Ijtiḥād*, the process of reasoning in a spirit of dedication to the will of Allāh, based on the Qur’ān and *Sunnah*, which, through the process of *ijma’*, assures the final assimilation by juristic acumen as accepted by the collective will of the ‘*Ummah*, the Muslim Community. It goes without saying that its pre-requisite is a thorough knowledge of the Qur’ān and the *Sunnah* together with juristic acumen for its assimilation.

The *Fatāwa* (verdicts) of the *Siḥābah*, the Companions, generally known as *āthār*, are quite legitimately not divorced from the general concept of the prophetic *Sunnah* and, with evident justification, the *Sunnah* of the first four caliphs was given prominence or so to say priority over that of all other *Siḥābah*, the Companions.

The commandments of the first two categories are revealed to the Prophet word for word through Gabriel whereas the third category of commandments was generally revealed by ‘*ilqā’* or *ilhām* (intuitions) to the Prophet, without any formalities of words. The first form is that of *waḥī matlū*, the Qur’ān, the word of Allāh and the other form is the *Waḥī ghayr matlū*, the *ḥadīth*, the word of the Prophet himself. The Qur’ān is the Book of Allāh and the *Ḥadīth* and *Sunnah*, generally speaking, are the oral and practical, rather authoritative interpretation and commentary on the Book of Allāh, to aid the correct understanding of the meaning of the Qur’ān. In other words, one is Qur’ān, the Book which is preserved in writing on paper and in the hearts of people and the other, the *Sunnah*, is the Qur’ān in practice. The Qur’ān contains the principles and absolute truths whereas the *Ḥadīth* and *Sunnah* of the Holy Prophet contain its details and particulars. Hence, the whole edifice of the *Shari’ah* is based on the *Waḥī matlū*, the Qur’ān and *Waḥī ghayr matlū*, the words and actions of the Holy Prophet. One who tries to hold to the Book alone deviates from both the *Sunnah* and the Book. In the words of al-Shātibī :

“فإن السنة جاءت مفسرة للكتاب فمن أخذ بالكتاب من غير معرفة
بالسنة زل عن الكتاب كما زل من السنة”

There are a number of commandments laid down in the Qur’ān and similarly there are many which have been ordained by the Prophet. That is why, wherever the Qur’ān commands its followers to obey Allāh, it necessarily

²Al-Qur’ān, *Sūrah Al-Nisa’* (The Women) IV : 80,

“من يطع الرسول فقد اطاع الله”

commands to obey the Prophet. Rather, it goes further and declares that obedience to the Prophet is the obedience to Allāh Himself :³

In the words of Allāh :

“Nor does he say (ought) of (his own) desire. It is no less than inspiration sent down to him”.⁴

The Qur’ān recounts certain provisions of law but the exact connotation is presented in the definitive form of words and actions by the Prophet. Besides, the performance of an act within the sight or knowledge of the Prophet, in the absence of any approbation or reprobation, is also included in the category of *Sunnah*. It is stated in the Qur’ān that Allāh sent the Prophet with the object and purpose that he be obeyed. In fact, the criterion of the love of Allāh is obedience to the Holy Prophet. The Qur’ān declares :

“Say ; If ye do love Allāh, follow me : Allāh will love you”.⁵

The Qur’ān says about the Holy prophet :

“Allāh did confer a great favour on the Believers, when He sent among them an Apostle from among themselves, rehearsing unto them the signs of Allāh, sanctifying them, and instructing them in Scripture and Wisdom, while, before that, they had been in manifest error.”⁶

“He teaches them *Kitāb* and *Ḥikmat*”. The meaning of *Al-Kitāb* to be the Qur’ān is evident. ‘*Al-ḥikmat*’ the commentators have defined to be the *Ḥadīth* and *Sunnah* of the Prophet. *Ḥadīth* and *Sunnah*, in a sense, are also revelations from God without formulation in words, because the Qur’ān at several places has used the word انزل (sent down) for the *Ḥikmat* also. It will thus be irrational to think that the Qur’ān was ordained without involving in fact the *Sunnah* of the Prophet who was the Vehicle of God’s Message.

Al-Shawkānī in his book on the principles of jurisprudence, ارشاد الفحول has quoted ‘*Awza’ī* who said :

³Al Quran, *Sūrah Al-Nisā*’ (The Women) IV : 80,

”من يطع الرسول فقد اطاع الله“

⁴Al-Qurān, *Sūrah Al-Najm*, (The Star), LIII : 3,

”وما ينطق عن الهوى ان هو الا وحيى يو حى“

⁵Al-Qurān, *Surōh Āl-i-‘Imrān* (The Family of ‘Imrān), III : 31,

”قل ان كنتم تحبون الله فاتبعونى يحبكم الله“

⁶Al-Qur’ān, *Surōh Āl-i-‘Imrān*, (The Family of ‘Imrān), III : 164,

”لقد من الله على المؤمنين اذ بعث فيهم رسولا من انفسهم ينزلوا عليهم آياته

ويزكيهم ويعلمهم الكتاب والحكمة ان كانوا من قبل لفي ضلال مبين“

“The Book of God stands in the need of *Sunnah* more than the *Sunnah* needs the Qur’ān”.⁷

‘Allāmah Anwar Shāh Al-Kashmīrī has said that without the *Sunnah* it is neither possible to have faith in the Qur’ān, nor to practise Islam.⁸

Importance :

If we, therefore, fail to give the importance to *ḥadīth* and *Sunnah* which they rightly deserve, it will be difficult to practise Islam in the real sense. For example, the Qur’ān commands :

“And be steadfast in prayer”.⁹

We can only know through the *Ḥadīth* and *Sunnah* of the Prophet as to how and when the prayer is to be performed. Those who insist that to understand and practise Islam only the Qur’ān is sufficient, let them show us as to how they would perform prayer in the light of the Qur’ān’s provision alone.

The Qur’ān says :

“And practise regular charity”.¹⁰

Now the classification and the fixed quantity of assets as termed in the language of the law *nisāb* and the period of its possession and the rate of *Zakāt* can only be determined in the light of the *ḥadīth*.

The Qur’ān says :

“And complete the *Ḥajj* and ‘*Umra* in the service of Allāh”.¹¹

No one knows how the *Ḥajj* and ‘*Umra* would be correctly performed. This can only be so performed if we know the *Sunnah* of the Holy Prophet.

Allāh says in the Qur’ān :

“It is for Us to collect it and to promulgate it”.¹²

⁷ Al-Shawkānī, Muhammad b. ‘Ali (d. 1255 A. H.) : *Irshād al-Fuhūl*, Cairo, 1356/1937, Chapter on *Al-Sunnah*, p. 33.

⁸ *Sunnat wa Ḥadīth ka Maqām* (Urdu Tr. of Mustafa Sabba’ī’s “Al-Sunnat wa Makanatuha fi-al-Tashrī‘ al-Islāmī”) Karachi, with Introduction by Mawlānā Muhammad Yūsuf Binnawrī, p. (h).

⁹ Al-Qur’ān, *Sūrah Al-Baqarah* (The Cow), II : 43, 83, 110,
“واقموا الصلوة”

¹⁰ *Ibid*, “وآتوا الزكوة”

¹¹ Al-Qur’ān, *Sūrah Al-Baqarah* (The Cow), II : 196,
“واتموا الحج والعمرة لله”

¹² Al-Qur’ān, *Sūrah Al-Qiyāmah* (The Resurrection), LXXV : 17,
“ان علينا جمعه وقرآنه”

He further says :

“Nay more, it is for Us to explain it (and make it clear.)”¹³

It is a matter of common knowledge that *bayōn*, description or explanation, means to elucidate and expound the hidden, vague, brief or an unknown matter. Here *bayōn* means to describe, explain and disclose the meaning and the real intent of Allāh which may remain obscure to a reader while reciting the Qur’ān.

This *bayān al-Qur’ān* when rendered in words by the Prophet was named as *Hadīth* and as it was practised was named as the *Sunnah*. The subject was revealed to him by the Divine knowledge, and the words in which it was described were those of the Prophet himself.

Allāh says in the Qur’ān :

“And We have sent down unto thee the Message; that thou mayest explain clearly to men what is sent for them, and that they may give thought.”¹⁴

The verse clearly proves that the words and actions, *Hadīth* and *Sunnah* of the Prophet are the manifestations of the will of Allāh as indicated in the Qur’ān, which can be best known and described only by His Prophet.

Allāh says in the Qur’ān :

“This day have I perfected your religion for you, completed my favour upon you, and have chosen for you Islam as your religion.”¹⁵

The “*ni’mat*” which is indicated by the Qur’ān in this verse is in fact the *Sharī’ah* as a whole, the entire course of life during full 23 years of the Prophet’s prophethood. It never happened with the *Ṣiḥābah* to ask for any sanction for the mandate of the Prophet beyond itself.

A *Ḥadīth* or *Sunnah* will either explain the verse of the Qur’ān or will add something to its commandment. In the first category it will have secondary position to the Qur’ān as it will be based on the Qur’ān itself whereas in the second situation, if there is no mention about the commandment in the Holy Qur’ān, it will stand on the Prophet’s sanction. In the Islamic legal literature, therefore, one has to consider with equal force the text of the

¹³Al-Qur’ān, *Sūrah Al-Qiyāmah*, (The Resurrection), LXXV : 18,

”ثم ان علينا بيانه“

¹⁴Al-Qur’ān, *Sūrah Al-Naḥl*, (The Bee), XVI : 44,

”وانزلنا اليك الذكركلتبين للناس ما نزل اليهم ولعلم يتفكرون“

¹⁵Al-Qur’ān, *Sūrah Al-Māidah*, (The Table Spread), V : 4,

”اليوم اكملت لكم دينكم وانممت عليكم نعمتي ورضيت لكم الاسلام ديناً“

Qur'ān and the *ḥadīth* and try to bring about reconciliation and harmony between the two, if there appears to be some disagreement between the two, which, in fact, is not there.

The question, however, arises about those matters or situations not covered in the Qur'ān, whether the *Sunnah* can be the sole basis of our legislative process. To answer this question, the *Ḥadīth* and *Sunnah* may further be classified into three :

- (i) The *aḥādīth* which are in conformity with the Qur'ān.
- (ii) The *aḥādīth* which elaborate and elucidate the commandments of the Qur'ān.
- (iii) The *aḥādīth* which lay down new rules in the *Sharī'ah* in respect of which either the Qur'ān is silent or its commandment remains un-specific.

There is a difference of opinion among the 'Ulamā' on this point, but the generality of 'Ulamā' has followed the view that *Sunnah* can be the sole source of *Sharī'ah* in matters which have not been dealt with in the Qur'ān. They take it to be *ḥikmat as 'ilqa'* (intuition) or inspired by Allāh.

Enforcement :

No body can deny the existence of such *aḥādīth*. The question is about their enforcement as the sole source of the *Sharī'ah* in such matters, i. e. of the *Sunnah* being its own sanction.

The Qur'ān says :

“Then let those beware who oppose the Apostle's order lest some trial befall them or a grievous penalty be inflicted on them.”¹⁶

This verse, though indirectly, points out to some such commandment that was given by the Prophet on his own, not mentioned in the Book of Allāh, because had that “*amr*”, (commandment) been that of the Qur'ān, its opposition would be termed as the opposition to the Qur'ān and not an opposition to the commandment of the Prophet.

The Qur'āns lays down :

“But no, by thy Lord, they can have no (real) Faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction.”¹⁷

¹⁶Al-Qur'ān, *Sūrah Al-Nūr*, (The Light), XXIV : 63,

“فليحذر الذين يخافون عن امره ان تصيبهم فتنة او يصيبهم عذاب اليم”

¹⁷Al-Qur'ān, *Sūrah Al-Nisā*, (The Women), IV ; 65,

“فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم ثم لا يجدوا في انفسهم

حرجا مما قضيت ويسلموا تسليما”

This Prophetic *Sunnah* can, therefore, ordain the necessary prerogative, permission or prohibition, although it can never override the Qur'ān.

In Pakistan Constitutions :

The Qur'ān and *Sunnah* are the two pillars of the *Islamic Shari'ah* which have been recognized as such in all the Constitutions of Pakistan. It has been guaranteed in our Constitution that no law shall be made repugnant to the injunctions of *Islam* as enshrined in the Qur'ān and the *Sunnah*. What we require today is to derive norms from the *Hadīth* and *Sunnah* literature for the purpose of re-statement and codification of *Islamic* laws, to infuse the *corpus juris* of Pakistan with them, to keep the living and organic relationship between the two as an active force for our socio-religious fabric of spiritual and worldly life, to provide the general direction for authentic practice and ultimately to develop into a formal discipline to impart stability and consistency to our reorientation and social reorganisation on purely *Islamic* pattern.

III. *Ijmā'* :

Ijmā' is another source of *Islamic* Law though its position is secondary as compared to the Qur'ān and the *Sunnah*. In juristic terminology it is called "consensus of the opinion of the learned ones in *Islamic* jurisprudence." It may be defined as the rule governing the *shari'ah* which results from the consensus of Muslim jurists on a particular question of law within the limits warranted by the Qur'ān and the *Sunnah*. In the developing period of *fiqh*, some were of the opinion that the validity of *Ijmā'* should be confined to the Companions of the Prophet and others would extend it to their Successors, but no further. Imām Abū Ḥanīfah affirmed its validity for all time.

It is said in *Tārīkh al-fiqh* by Al-Khizrī that the commandments which stand proved by *Wahī* are not but the incidents that occur in our day to day life are innumerable. If their character and concerned mandate in the light of the *Wahī* is not determined, they will remain uncharacterised and the claim of the perfection of *dīn* (*Islam*) shall be questionable (See footnote 15 *supra*). It is, therefore, expedient if authority is conferred upon the learned ones in *Shari'ah* to discover and apply the rules of the *Shari'ah* and find correct legal mandate in accordance with the principles and rules of the *Shari'ah* for any matter not specified in the Qur'ān and the *Sunnah*.

"The laws so laid down", says Sir Abdul Rahim in his book, *Muhammadan Jurisprudence*,¹⁸ "are presumed to be what God intended and are thus covered by the definition of Law as a communication from God."

¹⁸Madras, 1911 p. 53.

The Holy Prophet is reported to have said :

“لن نجمع امتي على الضلال”

“My 'Ummah (Community) will never agree in error.”

It is, however, essential that the persons competent to form *Ijmā'* should possess exemplary qualifications in the Science of the *Shari'ah* and exhibit unimpeachable character in their social life.

IV. *Qiyās or Ijtihād* :

Qiyās is a systematised process of deduction by analogy relating to a matter, not falling within the text of the Qur'ān, the *Sunnah* or the *Ijmā'* but coming within their intendments.

It is the fourth source of Islamic Law. It includes all the commandments and directives which it is obligatory to know by *Ijtihād*, the process of reasoning based on the Qur'ān and the *Sunnah*, in a spirit of dedication to the will of *Allah*; this through the process of *Ijmā'*, assures its final assimilation by juristic acumen and accepted by the collective will of the 'Ummah, the Muslim Community. (It goes without saying that its prerequisite is a thorough knowledge of the Qur'ān and the *Sunnah* together with juristic acumen).

Imām Abū Hanīfah has widened its scope to a great extent. It is, however, the cardinal principle that *Qiyās* should not be repugnant to any Injunctions of the Qur'ān, the *Sunnah* or the *Ijmā'*, otherwise the mandate based on *Qiyās* shall be discarded.

It may be clarified that juristic deduction of law by using the process of analogy only expounds the law and does not initiate it. Its authority is merely presumptive. It is, therefore, always open to a Court of Law not to follow a particular ruling of this category if, in the exercise of its own judgement based on the principles of the Qur'ān and the *Sunnah*, that ruling is found to be given on incorrect analogy.

V. *Custom ('Urf)* :

Custom, '*Urf* has also been recognised as a legal reality having the force of law. The word "*Ma'rūf*" occurring at places in the Qur'ān is a pointer to this. It may, however, be clarified that to bring custom within the ambit of "the sources of Islamic Law" it is essential that the custom or usage must not be repugnant to the dictates of the Qur'ān or the *Sunnah* or the consensus of the opinion of the Muslim jurists i. e. *Ijmā'*. It is not necessary that the custom be prevalent and continuing from a particular age but for its enforcement as law it must be publicly known. Custom always pertains to a time and place and remains enforceable so long as it is in vogue among the people.

VI. Court's Precedents :

The importance of Court's ruling in a given case cannot be underestimated, but it is never regarded as law-making process. It only helps in applying and enforcing the law, Court's precedents specially in the field of Criminal Law of Islam play a vital role in fixing *ta'zīr* against a convict, because in offences, barring *ḥudūd* and *Qiyās* (retaliation), the nature and extent of punishment (*ta'zīr*) has been generally left to the discretion of the *Qāḍī* or the Ruler.

Pakistan View :

Under British rule, Indian Courts were of the view that the Courts must adhere to interpretations of Muslim Law made by the four *Imāms*. But, in Pakistan, the Supreme Court has observed in the case of *Khurshid Bibi v. Muhammad Amin*¹⁹ that "the learned *Imāms* never claimed finality for their opinions but due to various historical causes, their followers in subsequent ages, invented the doctrine of *taqlīd*, under which a *Sunnī* Muslim must follow the opinion of any one of their *Imāms*, exclusively, irrespective of whether reason be in favour of another opinion. There is no warrant for this *doctrinaire fossilization*, in the Qur'ān or authentic *Aḥādīth*."

A Full Bench of the High Court of West Pakistan, Lahore, also observed that a *Qāḍī* or a Court of Law may differ with the *Qiyās* of earlier *A'imma* and *fuqaha*, but that will be on the basis of interpretation and extension of the rule of decision contained in the Qur'ānic and Traditional Text or *Ijma'* and not on the basis of what appears to be more agreeable to the Judge. If there is no clear rule of decision in Qur'ānic and Traditional Text nor an *Ijma'*, or a binding juristic analogy (*Qiyās*), a *Qāḍī* or a Court may resort to private reasoning (*Istidlāl*) and, in that, he will undoubtedly be guided by the rules of justice, equity and good conscience or, in terms of *Fiqh*, by the doctrines of *Istihṣān* and *Istiṣlāḥ*."²⁰ It was also observed in this judgement that "the Courts must be given the right to interpret for themselves the Qur'ān and *Sunnah*; and that they may also differ from the views of the earlier *juris consults* of Muslim Law on grounds of *Istihṣān* (i. e. equity) or *Istiṣlāḥ* (i. e. public good) in matters not governed by a Qur'ānic or Traditional Text or *Ijma'* or a binding *Qiyās*. At the same time, it must be remembered that the views of the earlier jurists and *Imāms* are entitled to the utmost respect and cannot be lightly disturbed but the right to differ from them must not be denied to the present day Courts functioning in Pakistan, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligation

¹⁹Pakistan Legal Decisions, 1967, S. C. 97.

²⁰Pakistan Legal Decisions, 1964, (West Pakistan) Lahore 558 (F.B.).

resting on all Courts to interpret the law they are called upon to administer and apply in cases coming before them.”²¹

The Problem :

In principle, one may not disagree with the proposition laid down above but the question is “who will do it”? If the judges of our Courts in Pakistan do possess the requisite learning in the Qurān, *Ḥadīth* and the *Fiqh* literature with adequate knowledge of the ‘Arabic language, they will certainly be competent, but the difficulty is, to say the least, that most of them do not even know the ‘Arabic language.

Mr. Justice Wahiduddin Ahmad, probably, being conscious of this practical difficulty, observed, “In my judgement, this is a path not free from danger and must be avoided. It was for this reason that the Privy Council as early as 1897 disapproved of this tendency and discouraged the Courts of Law to put their own construction on Qur’ān in opposition to the express ruling of Muḥammadan Commentators of great antiquity and high authority.”²²

There may, however, arise some situation, as pointed out by Sir Abdul Rahim in his Book on Muḥammadan Jurisprudence, “that a rule of law deduced by the application of analogy to a text is in conflict with what has been expressly laid down by some other text, or by the unanimous opinion of the learned. All the four *Sunni* Schools of law agree that in such cases the former must give way to the latter. It may happen that the law analogically deduced fails to commend itself to the jurist, owing to its narrowness and inadaptability to the habits and usages of the people and being likely to cause hardships and inconvenience. In that event also according to the Ḥanafīs, a jurist is at liberty to refuse to adopt the law to which analogy points, and to accept instead a rule which in his opinion would better advance the welfare of men and the interests of justice.”²³

Thus, inspite of the fact that the analogy (*Qiyās*) clearly points to one course but if the Legist “considers it better” (*Istiḥsān*), he may follow a different course. He would say “analogy in the case points to such and such rule but under the circumstances I hold it far better to rule such and such”. This rule was enunciated by Imām Abū Ḥanīfab, commonly known as *Istiḥsān*. Malik b. Anas has enunciated another rule called *Istiḥlah*.

This (*Istiḥsān*) will be applied, even in the face of valid analogy, when a rule would work general injury. It is also called “*Maṣāliḥ al-Mursalāh*”. Shafi‘is’ rule is called *Istidlāl* which, according to them, is a distinct method

²¹Pakistan Legal Decisions, 1964, (West Pakistan), Lahore 558 (F.B.).

²²*Ibid.*

²³Abdul Rahim : Muḥammadan Jurisprudence, Madras, 1911, p. 163.

of juristic deduction, not falling within the scope of *Qiyās*. It is rather based on the rule of permissibility.

Section 3. Whoever believes in the Oneness of Allāh, recognises Muḥammad as His last Messenger and does not believe in any kind of Prophethood after him in any sense of the term or of any description whatsoever, and avers himself to be a true Muslim, is a Muslim.

Muslim
Defined

COMMENTARY

The question as to who is a Muslim is of basic importance. A Muslim, in common parlance, means a person who professes the religion of Islam i.e. acknowledges that there is no God but One and that Muḥammad is His Prophet. In several judgements of the superior Courts of Indo-Pak sub-continent this definition has found favour.

Indian Courts' Decisions :

In a Division Bench case of Madras High Court, *Narantakath Vs. Parakkal*²⁴ the principle laid down was that the essential doctrines of Islam are that there is but One God and that Muḥammad is His Prophet. On the basis of this it was held that "this is the indispensable minimum and a belief short of this is not Islam and that a belief in excess of this for the law courts is a redundancy". With the result that a Court of law was not concerned with peculiarities in belief, orthodoxy or heterodoxy so long as the minimum belief exists.

Lord Macnaughten, had earlier, in the case of *Abdul Razak v. Agha Mohammad*²⁵ observed, "No Court can test or gauge the sincerity of religious belief. Therefore, a man to be treated a Muslim must profess to be a Muslim and his conversion must not be colourable."

Pakistan View :

A judge of the High Court of Sind and Baluchistan in a recent case, *Mrs. Aiyasha Koreshi Vs. Hishmatullah*²⁶ observed, "For becoming a Muslim all authoritative books of Islam are agreed that if a person believes in the unity of God (Allāh) and Muḥammad (May peace be upon him) to be his Prophet and also says that he is a Muslim then he becomes a Muslim and no other formalities or rituals are to be gone through by him."

The same view was expressed in an earlier decision by a judge of the West Pakistan High Court, Lahore, who held, "A person, who has read

²⁴Indian Law Reporter (1922). 45 Madras, p. 986.

²⁵(1893), 21 Indian Appeals, p. 56.

²⁶Pakistan Legal Decisions, 1972, Karachi, 635.

'*Kalimah*' even once, believes in the unity of God, and that the Prophet Muḥammad (peace be upon him) is His last Prophet and professes (himself) to be a Mussalmān, must be accepted as such."²⁷

The above view, in its essence, is correct, yet it may be clarified that the acknowledgement of the Prophethood of Muḥammad means and includes the belief in and acknowledgement of all the essentials of Islam, which stand proved by the Holy Qur'ān and the Prophetic traditions, upon which there is an '*ijma*' of the '*Ummah*'. (For details see *Ikfār al-Mulḥidīn*, by Anwar Shah Al-Kashmiri, published by Majlis-i-Ilmī, Karachi).

Three Kinds of Muslims :

Amīr Kātib b. Amīr 'Umar Al-Fārābī al-Atqānī known as Abū Hanīfah, the Second, has stated in his Commentary on 'Usūl al-Bazdawī (vol. v, MSS. Majlis-i-Ilmī, Karachi) that there are three kinds of a Muslim :

- (i) *Prima faice Muslim* (المسلم الظاهري) —One who recites the *Kalimah* of Islam, "اشهد ان لا اله الا الله واشهد ان محمداً عبده ورسوله" performs his prayers in the company of Muslims, notwithstanding the fact that the reality of his faith be unknown.
- (ii) *Legal Muslim* (المسلم الحكمي) —One who by reason of his parents being Muslims is presumed as Muslim with his parents, notwithstanding the fact that the acknowledgement of the *Kalimah* of Islam be not on his tongue.
- (iii) *Real Muslim* (المسلم الحقيقي) —One who believes in the Oneness of Allāh and acknowledges Almighty Allāh with all His Qualities as is Their reality, believes in and acknowledges His Prophets as is their reality and acknowledges all the Constituents of Islam as is their essence, which includes resurrection.

Every Muslim, whether he be *Prima faice*, *Legal* or *Real* will, thus, be deemed to be a Muslim until it is proved that he is not a *Real Muslim*.

Imān and Islām :

The tradition of the Prophet defines *Imān* as :

- (i) Faith in the Oneness of Almighty Allāh ;
- (ii) Faith in His Prophets ;
- (iii) Faith in His Angels ;
- (iv) Faith in His Revealed Books ; and
- (v) Faith in the World Hereafter.

²⁷Pakistan Legal Decisions, 1959, Lahore, 205.

The Tradition also defines the Constituents of Islam as :

- (i) the *Kalimah* :
 “اشهد ان لا اله الا الله و اشهد ان محمداً عبده و رسوله”
- (ii) Prescribed Prayers (*Ṣalāt*) ;
- (iii) Prescribed Alms (*Zakāt*) ;
- (iv) Fasting in the month of *Ramaḍān* ; and
- (v) Pilgrimage (*Hajj*).

Finality of Prophethood :

It may, however, be clearly noted that mere belief in Prophet Muḥammad (peace be on him) as a Prophet will not be enough. For, according to Islāmic faith he was the last Prophet. The belief must, therefore, assert the finality of Prophethood (*Khatm-i-Nubūwwat*) in Muḥammad viz: that he was the last prophet after whom no other Prophet of any kind or description would follow.

Position of *Aḥmadis* :

There was an old controversy in Indo-Pak sub-continent whether *Aḥmadis* were Muslims or not. In 1974, the matter was taken up in the Pakistan Parliament and a Special Committee of the whole House of National Assembly was constituted to consider the question. The Special Committee after recording evidence of both *Aḥmadis* and non-*Aḥmadis*, passed a resolution on the 7th Sept. 1974 recommending to the National Assembly to pass a bill to the effect that *Aḥmadis* whether of Qādiyānī group or Lahori group be included among the minorities alongwith other minorities like *Hindūs*, *Budhists*, *Sikhs*, *Christians*, *Parsis* etc. in the Constitution.

This has changed the previous position of the *Aḥmadis* who according to the decision in the case of *Norantakath* [1922 (45) Mad. 986, 999], (India) were held to be a sect of Muḥammadans, notwithstanding their differences from other Muḥammadans is some other matters of religious belief. Briefly the facts of the case were that a Moplah woman's husband after sometime became an *Aḥmadi* and the woman married a second husband. A question arose whether her act amounted to bigamy. The lower Court upheld the contention that conversion to the *Aḥmadi* faith being considered by generality of Muslims as an act of apostasy, the marital tie had been severed and the woman was validly married for the second time.

The High Court in revision reversed the lower Court's decision and held that *Aḥmadis* believed in the two fundamental dogmas of Islam viz : unity of God and Prophethood of Muḥammad and thus disapproved of the view of the people who are prone to charge others with unbelief and treat them as heretics.

The position has now changed in Pakistan after the enactment by the National Assembly declaring the Qādiyānīs (*Aḥmadis*) as non-Muslims.

The enactment not only settled the controversy by reversing the hitherto accepted religious status of the *Aḥmadīs* on the basis of the Indian Courts' decisions, but also firmly laid down that unless a person believes in the absolute and unqualified finality of Prophet Muḥammad, he is not a Muslim.

Definition of Muslim as given in Majmū'ah Qawānīn-i-Islām :

Some twelve years ago, the present writer in his book, *Majmū'ah Qawānīn-i-Islām*, had already defined "Muslim" as follows :—

"Whoever believes in the Oneness of God and affirms Muḥammad (peace be upon him) as His *last* Prophet and avers himself to be a Muslim is a Muslim".²⁸

The belief in the finality of the Prophethood of Muḥammad was included as an ingredient of being a Muslim. The definition now given in the above Section is, however, more comprehensive in this respect.

Constitution of Pakistan :

The Constitution of Islamic Republic of Pakistan, 1973 by its Second Amendment Act XLIX of 1974 has put emphasis on a Muslim's belief in the finality of Prophethood of Muḥammad as under :

"(3) A person who does not believe in the absolute and unqualified finality of the Prophethood of Muḥammad (peace be upon him) the last of the Prophets or claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muḥammad (peace be upon him), or recognises such a claimant as a Prophet or a religious reformer, is not a Muslim for the purpose of the Constitution or law."

From the above discussion, it would thus appear that every person who accepts and acknowledges Oneness of Allāh, Finality of the Prophet Muḥammad, and all the essentials of Islam which stand proved by the dictates of the Qur'ān and Prophetic traditions and avers himself to be a Muslim is a Muslim.

Presumption :

A person may be a Muslim either by birth or by conversion. If one of the parents of an infant is a Believer the presumption under Islamic law is in favour of the infant being a Muslim.²⁹ The Madras High Court in pre-partition India had held that a child is presumed to belong to the religion of the father (*Narantokath v. Parakhal* (1922) 45 Mad. 986). It is, however, obvious that this view does not disturb the rule of Islamic law for in a valid Muslim marriage the father must always be a Muslim. However in case the marriage is unlawful and void *ab initio* the child shall belong to the mother.

²⁸Tanzīl-ur-Raḥmān : *Majmū'ah Qawānīn-i-Islām*, Karachi, 1965, volume i, pp. 32, 55. Also see "*Al-Balāgh*", Karachi, April, 1975.

²⁹*Fatawa 'Ālamgīriyyah*, Dewband, vol. ii, p. I: "وَأُولَادُ يَتِيمٍ خَيْرًا لَا بُوَيْنَ دِينًا"

Section 4. Marriage or *Nikāḥ* (*Nuptiae*) is a religious legal contract that regularizes the sexual relationship between man and woman, establishes the lineage of their progeny and creates civil rights and obligations between them.

COMMENTARY

Nikāḥ, literally means joining together. In its technical sense, it means "marriage".³⁰ *Nikāḥ*, in the Qur'ān, has been described as (ḥiṣn حصن)³¹ that is, a fort, meaning the protection it affords-social, physical and moral, to the couple joined together in wedlock.

Definition of *Nikāḥ* in *Fiqh* :

Nikāḥ, in *Hidāyah*, is described to be a contract which has for its object begetting and legalizing of children.³²

In *Kanz al-Daqā'i'q*, however, *Nikāḥ* is said to be a contract that is entered into by a man with a woman for the enjoyment of the "beneficiary rights over her" (i. e., the enjoyment of the proprietary sex rights) as an "owner".³³ The same definition finds place in the *Fatāwā 'Ālamgīrī*.³⁴ Likewise *Nikāḥ*, in *Sharḥ al-Waqāyah* is described as a contract brought about for legalizing the enjoyments of beneficiary right of man over woman.³⁵ *Nikāḥ*, under the Syrian Family Law, is defined as "a contract between a man and woman on account of which the woman becomes legalised to man. It serves the purpose of creating among them a life of co-relationship and of begetting children."³⁶

³⁰*Al-Fīrūzōbādī, Majd al-Dīn : Al-Qamūs*, Cairo, 1953, vol. i, p. 263:

“(النكاح) الوط والعقد ”

³¹*Al-Qur'ān, Sūrah Al-Nisā'*, (The Women) IV : 28.

³²Charles Hamilton : *Hedaya (Strictly, Hidāyah)* (Trans.) Lahore, 1960, p. 25. This definition does not occur in the text of *Al-Hidāyah*. It finds place in the preliminary note of the translator himself.

³³*Al-Nasafī, Maḥmūd : (d.710 A. H.) : Al-Kanz al-Daqā'i'q*, Muṭtabai Press, Delhi, *Kitāb al-Nikāḥ*, p. 97:

“النكاح عقد يراد به على ملك المتبعة قصداً ”

³⁴Nizam Burhanpuri, Al-Shaykh: *Fatāwa 'Ālamgīriyyah*, Dewband, *Kitāb al-Nikāḥ* vol. ii, p. I.

³⁵Ubaydullah b. Mas'ud : (d. 747 A. H.) *Sharḥ al-Waqāyah*, Muṭtabai Press, Delhi, *Kitāb-al-Nikah*, p. 4.

³⁶Qānūn al-Aḥwāl al-Shakhṣiyyah, Syria, 1953.

”الزواج عقد بين رجل وامرأة لتحل له شرعاً غايته انشاء رابطة للحياة المشتركة والنسل“

acceptance of the parties made at marriage time. The rights and obligations arising thus are a co-hesive whole based on the biddings of God and Traditions of the Prophet. Hence, Muslim jurists regard *Nikāḥ* to be both temporal and religious at the same time.

Nikāḥ—A Religious Injunction :

Nikāḥ has been denominated by the Prophet as his *Sunnah*.⁴¹ Hence, *Nikāḥ*, in certain circumstances, is an obligatory *Sunnah* (*muwakkadah*). If one is apprehensive of his committing adultery, in spite of his being capable of providing maintenance and paying dower to a woman, *Nikāḥ*, for him is obligatory (*Wājib*). He will be committing a sin if he does not contract marriage.⁴² One is apprehensive of transgressing the limits of God (*ḥudūd Allāh*) in marriage, *Nikāḥ* for him is abominable (*makrūḥ*). According to the sayings of the Companions of the Prophet, *Nikāḥ* has a preference over supererogatory ritual i.e. *nafl* prayers.⁴³

Islamic Law, therefore, holds that the institution of marriage is comprised of both the '*ibādāt* (worships) and the *mu'āmalāt* (worldly affairs). In its constitution, it is a civil contract in which the free consent of both the parties is essential; on the accomplishment of it, however, the relationship of both the contracting parties is not determined as of a pure civil contract, but is determined in combination with its religious connotation.

⁴¹Al-Sarakhsi, Shams al-Din : (d. 482 A. H.): *Al-Mabsūt*, Cairo, vol. iv, p. 193,

Bayhaqī : *Al-Sunan-al-Kubrā*, Deccan, vol. vii, p. 78 :

Aḥmad b. Ḥanbal : *Musnad*, Cairo, vol. iv *Ḥadīth* No. 2845:

Ḥākim : *Al-Mustadrak*, Hyderabad, Deccan, vol. ii, p. 164.

⁴²Nizām Burhanpuri, Al-Shaykh : *Fatāwa 'Ālamgīrīyyah*, Deoband, n. y. vol. ii p. I.

Ibn Qudamah (d. 620 A.H.): *Al-Mughnī*, Cairo, vol. vi, *Kitāb al-Nikāḥ*, p. 446.

⁴³Al-Kāṣānī, Ala al-Dīn : (d. 593 A. H.) : *Al-Bada'i'-al-Sana'i'*, Cairo, vol. ii, p. 229.

Ibn Qudāmah : op. cit, vol. iv, p. 446.

CHAPTER—II

Inter-marriages

Section 5. Marriage between a male and a female belonging to different Muslim sects is valid.

Inter-marriage
among Muslim
sects.

COMMENTARY

Islam is a universal religion. It brooks no caste, creed or colour and makes no distinction on that basis. However, in the early period of Islam, by a historic catastrophe, a number of sects did emerge. (For details see Abdul Karim Shahristanī's "*Al-Milal wal Naḥal*", Cairo 1388/1968 Volume I; Abdul Hasan *Ashʿarī*'s "*Maqalat al-Islamiyyīn*", Lahore (Urdu Tr.).

Today, Sunnīs and Shiʿah are two main sects. Those among the Shiʿahs, who recognise twelve *Imāms* are called "Twelvers" (*Ithnāʿ Ashʿarī*), the largest of the Shiʿah sects. The followers of Ismaʿīl are called Daʿudī Bohras. Sunnī and Shiʿah laws differ in many respects from each other. Muslim males or females, belonging to any Muslim sect or adhering to any school of *fiqh* are at liberty to contract marriage with each other. That a Muslim male or female belongs to any particular sect declared by *ijmāʿ* (consensus of opinion of Muslim jurists) to be Islamic, is no bar to the eligibility of a male or female in contracting marriage with a member of another such sects. It in no way affects the validity of marriage contract and such a marriage is perfectly valid and legal.

According to the Shiʿah, the marriage contract of a *Shiʿah* female with a *Sunni* male is undesirable (*Makrūh*).¹ Likewise, according to *Sunnīs*, too, the marriage of a *Sunni* woman with a Shiʿah male is undesirable.²

Section 6. (a) The marital rights and obligations of husband and wife belonging to different Muslim sects shall, in the absence of any law to the contrary, be determined according to the sect they belonged to at the time of their entering into the marriage contract;

Rights and
obligations
of couples
belonging to
different sects.

¹ *Aziz Bano vs. Ali Muhammad Ibrahim*: All India Reporter, Allahabad, 1925, p. 720.

² Shāh ʿAbdul ʿAzīz Al-Muḥaddith, Dehlavī: *Fatāwa Azīziyah*, Hyderabad Deccan, vol. i, p. 40.

except when both or either of them, voluntarily abandon their sect and accept the other sect. In that case, their rights and obligations shall be determined according to the changed and adopted sect or sects.

(b) In the absence of any law to the contrary, where the parties belong to different Muslim sects the law applicable to the defendant's sect shall be followed by the court of law.

COMMENTARY

In cases where husband and wife belong to different Muslim sects, the rights and obligations of each of them shall be determined according to their *fiqh* to which he or she adhered to at the time of marriage. A woman after marriage can retain her separate sectarian individuality. She cannot be compelled to follow the rules of *fiqh* adhered to by her husband. Any one of them, however, can voluntarily abandon his or her sect, and adopt the other sect. Thereafter their rights and obligations shall be determined according to the adopted sects³, provided there is no law in force to the contrary. But in the absence of any law, or custom having the force of law, to the contrary in proceedings before a court, the rules of law of the sect to which the defendant belongs shall be applicable.⁴

It is, however, a principle of Ḥanafī jurisprudence (*‘Usul al-Fiqh*) that in cases falling within the domain of *‘ijtihād* (juristic analogy) where to act upon a rule of Ḥanafī *Fiqh* becomes impossible or it causes great hardship and untold misery, it is permissible for a Ḥanafī *Muftī* (*jurisconsult*) to give *fatwa* (verdict) on the rule of the conduct of some other Imām viz Mālik, Shafi‘ī or Aḥmad b. Hanbal, provided the situation be that of a general calamity and a demanding one, not being an individual case. Such a verdict shall, then, be treated as that of Ḥanafī *fiqh* and it shall be liable to be acted upon accordingly. This principle, according to the present writer, may be applied to courts, giving decisions based on the *fiqh* of some other universally recognized and accepted Sunni school of law, in similar matters and situations if the parties are Sunnis, and of the Shi‘ahs if the parties belong to Shi‘ah sect.

It is also laid down by the Ḥanafī jurists that a Ḥanafī Qāḍī, in such situation, may have recourse to the Mālikī or Shafi‘ī Law, but he cannot decide the case by himself according to Mālikī or Shafi‘ī law; he can, how-

³ *Husyn Ali vs. Hamidan*: Indian Law Reporter, 4 Allahabad, p. 205.

⁴ *Aziz Bano vs. Ali Muhammad Ibrahim*: All India Reporter, Allahabad, 1925, p. 720.

ever, refer the case to a Mālikī Qāḍī who will decide the case himself according to the Mālikī or Shāfi'ī law, and the decision of the latter Qāḍī shall be binding on the parties. This procedure could be workable during times when separate Qāḍīs, following different Schools of Law, used to be appointed by the State and the parties used to take their disputes to the Court of a Qāḍī of the School of *fiqh* they belonged to or wished. In present-day system of administration of justice courts are not established, in most of the Muslim countries, on sect basis or school-wise. It is, therefore, not possible to adhere to the old concept of referring the dispute to another Qāḍī. In the absence of any enactment, the Courts may, in the interest of justice, equity and good conscience, follow the rule to decide a case according to the law laid down by any established school of Muslim law. This principle in its application should, however, be restricted to the four known and recognized Sunnī schools of law for the Sunnīs, and the Shī'ah schools for the Shī'ahs, to avoid jeopardy in justice.

Section 7. The marriage of a Muslim male with a *kitābiyyah* *dhimmiyyah* (female citizen of a Muslim State) is valid, but his marriage with a *Kitābiyyah-ḥarbiyyah* (inhabitant of a country where Laws of Islam are not enforceable) is undesirable (*makrūh*).

COMMENTARY

A Muslim male may contract a valid marriage with a *kitābiyyah* i.e. a woman who is a believer in a Revealed Book,⁵ whom the Qur'ān terms as "*ahl al-kitāb*", People of the Book. It is stated in al-Durr al-Mukhtār that by the term "*kitābiyyah*" is meant a woman who believes in a Messenger of Allāh and also in a revealed Book.

People of the Book (*Ahl al-Kitāb*) :

The term "*ahl al-kitāb*" applies, in general, to the followers of Judaism and Christianity. In *Shari'ah* the term "*ahl al-kitāb*" means people who possess a Book or Scripture accepted by Muslims as a Book revealed by Allāh and the followers of the Book are called people belonging to a revealed religion. This term has been used in the Qur'ān for Jews and Christians as believers in a revealed religion. Amīr 'Alī has thus held the view that

⁵Al-Sarkhṣī, Shams al-din (d. 482 A.H.) : *Al-Mabsūt* (30 vols.) Cairo 1324 A.H. vol. v, p. 50; Al-Jaṣṣāṣ, Abū Bakr al Rāzī (d. 370 A.H.) : *Al-Aḥkām Al-Qur'ān*, Cairo, 1328 A.H., vol. i, p. 38; Al-Jazarī, 'Abdur Rahman: *Kitāb al-Fiqh 'alal Madhahib al-Arba'ah*, Cairo, 1936 A.D., vol. iv p. 199; Al-Nasafī: op. cit. p. 99; 'Ubaydullah b. Mas'ūd: op. cit. p. 4; Al-Qudūrī: op. cit. p. 148.

Parsīs and Brahmo Samajists are *ahl al-kitāb*, people of the Book and belong to a revealed religion (Amir Ali, op. cit. p. 183). But it is stated in *al-Hidayah & Bahr al-Rā'iq* that the fire-worshippers are not People of the Book. It is stated in *al-Mughnī* (of Hanbalī *fiqh*) that only the Jews and Christians are People of the Book (Ibn Qudamah, *Al-Mughnī*, Cairo, 1367 A.H. Vol. VI. p. 590). But it is stated in *Fatāwā Ālamgīriyyah* that the expression "People of the Book" is not confined merely to Jews and Christians but applies to every person who (whose religion) has a revealed Book and who believes in the same. Thus followers of the Book revealed to Abraham and the Psalms of David are included in the expression (Vol. ii p. 8). Same may be true of a group of Sabi'īn (Manadian) who are said to be the followers of Abraham and believers in monotheism; the other group of Sabi'īn, being star-worshipper, is *mushrik*.

The present writer finds himself in agreement with the view expressed in *Fatāwā Ālamgīriyyah*. It seems that the criterion to be applied in the matter is to see if the followers of a certain religion possess a revealed Book, accepted by Muslims as such, and believe in the Oneness of God. On this basis, the view as expressed by Amīr 'Alī is not sound. The Parsīs believe in two Gods: Yazdān & Ahraman, the God of Virtue and the God of Evil; this concept of duality of God and the belief in fire-worshipping makes them *Mushrik*. Similar is the case with Hindūs who are idolaters and are not monotheists. The Qur'ān makes a distinction between "People of the Book" on the one hand and the Idolaters (*Mushrikīn*) and *Kuffār* (Atheists) on the other, and prescribes different commandments as to their marriages with Muslims. (Also see sections 8 & 9 *infra*).

If one of the parents is *ahl al-kitāb* the woman shall be deemed to be *kitābiyyah*.⁶ According to al-Shāfi'ī and Aḥmad b. Ḥanbal such a woman shall not be deemed to be *kitābiyyah* and a Muslim male cannot marry her.⁷

It is, however, a condition that she should be a *kitābiyyah* by origin; she should not be a convert from Islam. It, however, makes no difference if she, being a Christian by origin, accepts judaism or vice versa.⁸

The Qur'an & the Marriage with *Kitābiyyah*

There are two verses in the Holy Qur'ān dealing with the marriage of a Muslim with a non-Muslim. They are as under :—

⁶Fatāwā Ālamgīriyyah, op. cit. vol. ii, p. 8:

”ومن كان أحد أبويه كتابياً والآخر مجوسياً كان حكمه حكم أهل الكتاب“

⁷Al-Maqdisī, Ibn Qudāmah: *Al-Mughnī*: Cairo, 1367 A.H., vol. vi, p. 593 (*Kitāb al-Nikah*).

⁸Mufti Muḥammad Shafī': *Jawāhar al-Fiqh*, Karachi, 1975, vol. ii, p. 133.

1. "Do not marry unbelieving women (idolaters) until they believe; A slave woman who believes is better than an unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe; A man slave who believes is better than an unbeliever, even though he allure you."⁹
2. "This day are (all) things good and pure made lawful unto you. The food of the people of the Book is lawful unto you and yours is lawful unto them. (Lawful unto you in marriage) are (not only) chaste women among the people of the Book revealed before your time."¹⁰

Difference of Opinion :

There has, however, been some difference of opinion in the past about the validity of the marriage of a Muslim with a woman belonging to a revealed religion. One group of Muslim jurists considered such a marriage to be prohibited. Their contentions are :

Firstly, the word "*Mushrik*" (infidel) occurring in (II : 221), *Sūrah al-Baqarah* has been used in the Qur'ān in a general sense and applies both to "Idolaters" and "People of the Book", except where a certain verse is meant to apply only to the People of the Book. Here in this verse there is no specification about the word "*Mushrik*", which is used in a general sense, and so the People of the Book are included in the prohibition.

Secondly, the People who believe in Trinity and attribute fatherhood of Jesus Christ to *Allāh* cannot be considered to belong to a revealed religion but only such people can be considered to be People of the Book who are monotheists. They argue on the basis of the verses (V: 75&76) of the Qur'ān: "They do blaspheme who say: *Allāh* is Christ, the son of Marry" and "They do blaspheme who say: *Allāh* is one of three in a Trinity."¹¹

Thirdly, they contend also that the verse (V: 6) in *Sūrah Al-Mā'idah* has been modified by the above verse (II: 221), thereby establishing

⁹Al-Qur'ān, *Sūrah Al-Baqarah* (The Cow), II : 221,

"ولا تنكحوا المشركات حتى يؤمن ولأمة مؤمنه خير من مشركه ولو أعجبكم ولا تنكحوا المشركين حتى يؤمنوا ولعبد مؤمن خير من مشرك ولو أعجبكم

¹⁰Al-Qur'ān, *Sūrah Al-Mā'idah* (The Table Spread), V: 6,

اليوم أحل لكم الطيبات وطعام الذين أوتوا الكتاب حل لكم وطعامكم حل لهم...

¹¹Al-Qur'ān, *Sūrah Al-Mā'idah* (The Table Spread),

V : 71, "لقد كفر الذين قالوا إن الله هو المسيح بن مريم

"لقد كفر الذين قالوا إن الله ثالث ثلاثة"

the fact that Christians believing in Trinity are not People of the Book and marriage with a woman belonging to such people is prohibited because she is a *Mushrikah* (idolatress).

The other group of jurists, who constitute the majority, base their view on the following grounds :

- (i) The words "*Mushrik*" and "*Mushrikah*" are not used in the above verse (221 of *Sūrah al-Baqarah*) in a general sense, but refer only to idolater and idolatress as distinguished from the category of 'People of the Book'.
- (ii) The mere belief in Trinity does not take the Christians out of the fold of 'People of the Book'. The verse does not make any distinction between Christians who believe in Trinity and those who are monotheists.
- (iii) The verse (221 of *Sūrah Al-Baqarah*) was revealed earlier and verse 6 of *Sūrah Al-Mā'idah* was revealed later; hence it cannot be modified by a verse that had been revealed earlier.

Ijmā' of the A'immaḥ Arba'ah:

There is however no difference of opinion on the point in question amongst the four *Imāms* viz. Abū Ḥanīfah, Mālik b. Anas, Al-Shāfi'ī and Aḥmad b. Ḥanbal. They all are of the opinion that the prohibition against the marriage with an idolatress does not apply to women who belong to a revealed religion. The same view is attributed to Abū Yūsuf, Muḥammad al-Shaybānī, and to other early jurists.

The View of 'Abdullah b. 'Umar:

It is, however, reported that 'Abdullah b. 'Umar, one of the jurists Companions of the Holy Prophet, considered the contract of marriage of a Muslim male with a *Kitābiyyah* as invalid.

There are, on this point, three statements of Ibn 'Umar:—

- (i) There is no harm in taking the food cooked by people of the Book i.e. Jews & Christians (*ahl al-kitāb*), but entering into marriage contract with their women is undesirable (*makrūh*).
- (ii) Allāh, the Almighty, has prohibited a *mushrik* woman to a Muslim male; and I do not know whether there can be any greater "*shirk*" than considering 'Īsā b. Maryam, or for that matter any person as Allāh": Ibn 'Umar said this when questioned about contracting marriage with Christian or Jew women.
- (iii) In reply to the question of one Maymūn b. Mihrān to the effect that they (the Muslims) lived in a part of land where they were so

intermingled with *ahl al-kitāb* that they had to marry their women and partake of their food, Ibn 'Umar read out the verse from the Holy Qur'ān (*āyat al-taḥlīl* V: 6) permitting marriage with a *kitābiyyah* and then read out the verse (*āyat al-taḥrīm* II: 221) from the Holy Qur'ān prohibiting marriage with *mushrikāt*. Maymūn rejoined that they too had read what Ibn 'Umar had read out to him, in spite of that they married the women from *ahl al-kitāb* and partook of their food. Ibn 'Umar, in reply, simply read out the said two verses again.

Imām Abū Bakr Ahmad b. Alī al-Rāzī al-Jaṣṣāṣ in his famous work "*Al-Aḥkām al-Qur'ān*" points out that 'Ibn 'Umar's evading of a clear reply over the question of marriage with a *kitābiyyah* and the recitation of two verses by him repeatedly was a proof of the fact that he could not make up his mind and form a definite opinion.¹²

'Ibn 'Umar's view that the marriage with a *kitābiyyah* was undesirable was not based on either its prohibition or forbiddance (*taḥrīm*) but, in fact, it related to the *kitābiyyah* of *Dār al-Ḥarb* i.e. those *ahl al-kitāb* who lived outside the territories of a Muslim State where the laws of *Sharī'ah* were not enforceable.

Historical Study :

Historical study of this question reveals that the Companions of the Holy Prophet (*Ṣaḥābah*) and the Successors of the Companions (*Tābi'īn*), in general, regarded the contracting of marriage with a *kitābiyyah* as legal.

Nā'ilah, the wife of 'Uthmān, the third Caliph, was a Christian at the time of her marriage. Ṭaḥḥ Ibn 'Ubaydullāh also married a Jew lady of Syria. Hudhayfah b. al-Yamān, as well, married a jewess.

Al-Jaṣṣāṣ made pointed reference to the said marriages in his noted work *al-Aḥkām al-Qur'ān*. He argued, that if marriage with a *kitābiyyah* was illegal the Companions of the Holy Prophet would never have entered into such marriage contracts. Al-Jaṣṣāṣ, further, maintained that among the successors of the Companions (*Tabi'īn*), Ḥasan b. Ziyād, Ibrahīm Nakḥī and Sha'bī were of the view that marriage with a *kitābiyyah* was quite legal, that there was no instance of a single Companion or Successor (*Tabi'ī*) who was against such marriage. Therefore, it could not be inferred from the statements of Ibn 'Umar that he considered a Muslim's marriage with a *kitābiyyah* as illegal. As a matter of fact, he held the view that such a marriage was undesirable (*makrūh*) and that the undesirability (*karāhiyyat*) was not owing to prohibition (*taḥrīm*); it was due to apprehension lest the

¹²Al-Jaṣṣāṣ, op. cit. p. 292-294, chapter on *Nikāh al-Mushrikāt*.

corrupt *kitābiyyah* of *Dār al-Ḥarb* and *Dār al-Kufr* (non-Muslim states) might pollute the faith and character of Muslims.

According to Ibn ‘Abbās, one of the Companions of the Holy Prophet, Muslims are permitted to marry only those *kitābiyyah* who are chaste and are subjects of Muslim State. Marriage with *kitābiyyah* of *Dār al-Ḥarb* or *Dār al-Kufr* (territory of infidels), according to him, is not permitted. He contended that Allāh’s command was with respect to those *ahl al-kitāb* who lived in *Dār al-Islam*. He maintained that to love those who were the enemies of Allāh and of the Holy Prophet could not be the conduct of *ahl al-Imān* and so marriage with such *kitābiyyah* could not be permitted.¹³

Al-Jaṣṣaṣ in his aforementioned book, rebutting the arguments of Ibn ‘Abbas said that the distinction made by Ibn ‘Abbas between *kitābiyyah dhimmiyyah* and *kitābiyyah ḥarbiyyah* had no basis. The Qur’ānic verse made no distinction between them. Ibn ‘Abbās was, therefore, wrong in particularising a general provision of law laid down in the Holy Qur’ān. Sa‘īd b. Musayyib and Hasan al-Baṣrī, too, were of the same opinion that the verse was of a general nature, indicating a general command. There could, therefore, be no justification for making distinction between a *dhimmiyyah* (non-Muslim citizen of a Muslim State) and a non-citizen (*ghair dhimmiyyah*) so far as the question of marriage with *kitābiyyah* was concerned. The correctness of this view has been upheld and acted upon by the ‘Ulamā’ in general.

Besides, the correct answer to the contention of Ibn ‘Abbas is that the obligation of one under relevant conditions to kill or fight with some person does not make one’s marriage with that person illegal. It has no bearing on the validity of marriage. If obligation of killing someone could be the basis of marriage prohibition, the marriage with *khawārij* (the Revolters) and outlaws must have been held to be illegal which is not a fact as is borne out by the following verse of the Holy Qur’ān: “If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond the bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; But if it complies, then make peace between them with justice, and be fair, for Allah loves those who are fair (and just).”¹⁴

¹³Al-Jaṣṣaṣ, op. cit. p. 292-294, chapter on *Nikāh al-Mushrikāt*.

¹⁴Al-Qur’ān, Sūrah *Al-Hujrāt* (The Inner Apartments), XLIX : 9
 “وإن طائفتان من المؤمنين اقتتلوا فأصلحو بينهما فإن بغت إحداهما على الأخرى فقاتلوا
 التي تبغى حتى تنفي إلى أمر الله فإن فاءت فأصلحو بينهما بالعدل وأقسطوا إن الله يحب
 المقسطين”

The Correct Position :

The correct position, as it appears, is that a Muslim's marriage with *kitābiyyah ghayr dhimmiyyah* or *harbiyyah*, though legal, is undesirable as it puts in jeopardy the upbringing of children as Muslims. The children, in such a case, under the influence of their mother, may adopt un-Islamic ways, abhorrent to the Islamic society and culture. This view gets support from *Al-Mabsūt* of al-Sarakhsī also: Hudhayfah married a Jew lady. Information of this reached 'Umar, the second Caliph. He asked Hudhayfah to terminate the marriage. On Hudhayfah's inquiry whether the marriage with *kitābiyyah* was prohibited, 'Umar, in answer, said, "No, it is not prohibited, but I fear that you people may fall a prey to shameless and infidel women of *ahl al-kitāb*".¹⁵

Shi'ah view on Marriage with Kitābiyyah :

There is a consensus of opinion, among the Sunni schools of *fiqh* that marriage with *kitābiyyah*, though valid, is undesirable. There is, however, difference of opinion among Shi'ah schools of thought. The *Uṣūliyyah* and *Mu'tazilah* go with the *Hanafīs* and consider marriage with a *kitābiyyah* as valid, while *Akhbari Shi'ahs* hold that permanent marriage with a non-Muslim (woman) is not valid. They say that only *Mut'ah* is permitted with a *kitābiyyah*.¹⁶ In *Kāfi*, *Tafsir Majma' al-Bayān* and *Tafsir 'Ayāshī*,¹⁷ it is stated that according to Imām Bāqir the command of Allāh in the verse "Lawful unto you (in marriage) are.....chaste women among the People of the Book, revealed before your time,..."¹⁸ has been abrogated by another command in the verse: "But hold not to the guardianship of unbelieving women.....".¹⁹ According to him, therefore, the marriage of a Shi'ah male with a woman of revealed religion is forbidden.

This view of Imam Bāqir appears to be incorrect for three reasons:—

- (i) The verse, as relied upon by Imam Bāqir, was revealed concerning those men and women who migrated to *Dār al-Islām* (Medīna)

¹⁵ Al-Sarakhsī: op. cit. vol. v, p. 50:

”فبقول يجوز للمسلم ان يتزوج كتابيه في دار الحرب ولكنه بكره لانه اذا تزوجها ثمه ربما يخنار المقام فيهم واذا ولدت تخلق الولد باخلاق الكفار وفيه بعض الفتنه فيكره“

¹⁶ Al-Hillī, Najm al-Din (d. 474 A.H.): *Sharāi' al-Islām*, Beirut, part ii, p. 19.

¹⁷ Tafsīr al-Qur'ān by Hāfiz Maqbūl Ahmad Dehlavī.

¹⁸ Al-Qur'ān, Sūrah *Al-Mā'idah*, (The Table Spread), V : 6.

¹⁹ Qur'ān, Sūrah *Al-Mumtahinah* (The Women to be Examined), LX : 10.

from *Dār al-Ḥarb* (Mecca) and those wives (or husbands) who remained in *Dār al-Ḥarb* in the state of *Kufr* (infidelity). The previous marriages, thus stood dissolved by conversion to Islam or by migration to *Dār al-Islam* from *Dār al-Ḥarb* of one spouse only. The Holy Qur'ān—therefore, has enjoined upon those males who were converted to Islam, not to take to *Kōfir* wives in their custody i.e. not to have conjugal relations with them.

- (ii) The term '*al-kawōfir*' applies to *mushrikīn* (infidels) and *Kuffōr* and not to *ahl al-kitāb* (people of the Revealed Book).
- (iii) If Imam Bāqir's view, respecting the command in the other verse, is taken to be correct, it will, then, be construed as a general direction and marriage with *kitābiyyah* shall, thus, come under exception.

Shaykh Abū Jā'far al-Ṭūsī (d. 460 A. H.) has stated: "The views expressed by our 'Ulama' lead to the conclusion that marriage with a person belonging to a religion opposed to Islam, such as a Jewess or a Christian woman is not valid. But a number of our 'Ulama' have held such a marriage to be valid." (Al-Istibṣār, Najaf, Vol. II, p. 382).

The view generally accepted in India and Pakistan was that a Shi'ah cannot lawfully marry a woman belonging to a revealed religion. Amīr 'Alī & Tyabji and some other writers tried to put forth a contrary view but that being a minority view, the view accepted by the majority that a marriage with *kitābiyyah* was invalid, remained prevalent and in vogue. Lately, in 1958, Late Syed 'Allāmah Muḥsin al Ḥākīm took a bold stand and declared firmly that the marriage with a *kitābiyyah* was valid though disapproved of. (Muntakhab al-Rasā'il, Najaf, 1380 A. H. p. 107).

Conclusion ;

To the present writer the view of the *Akhbāri Shi'ahs* that the marriage of a Muslim male with *kitābiyyah* is not legal seems to be incorrect and is contrary to the text of the Holy Qur'ān.

Court's View :

Pakistan's Supreme Court in *Ali Nawaz Gardezi V. Lt. Col. S. M. Yousuf* appears to hold the same view. Mr. Justice S. A. Raḥmān, who wrote the judgement, observed as follows :—

"In the High Court the validity of the complainant's marriage to Renate in England was also challenged on the ground that the complainant was a *Shi'a*, and under his personal law, his marriage to a non-Muslim lady was invalid. Reliance was placed in this connection on the rule of

private international law that the formal validity of a marriage had to be judged by the *lex loci contractus*, but that the capacity of the parties to enter into the marriage bond had to be determined according to the law of the domicile of the party concerned. (See *inter alia*, Brook V, Brook (I), Halsbury's Laws of England, Vol. 7, p. 91, para. 165, III Edition). The learned Single Judge as well as the Appellate Bench held, however, that the marriage of the complainant and Renate, at Hull, was a perfectly valid one. Syed Amīr 'Alī, in his well-known text-book on Muḥammadan Law, 4th Edition, at p. 327 *et seq.* had discussed the question of validity of a *Shi'a* Muslim's marriage to a non-Muslim woman of one of the scriptural sects. He has pointed out that such a marriage would be valid among *Usūlī Shi'as*, and a large section of the *Akhbārī Shi'as*, though one school of thought represented by the author of the treatise "*Sharai'ul-Islam*" (on which Baillie's Digest, Vol. II is mainly based) has condemned such a marriage as invalid. The complainant in present case declared on oath that he followed the *Shi'a* faith, but in case of a conflict between a clear Qur'ānic injunction and a doctrine of the *fiqh* he would follow the Qur'ān. He appears, therefore, to be a member of the '*Usūlī* persuasion. The Qur'ān clearly permits a marriage of a Muslim with a woman professing one of the scriptural religions. In the circumstances, Mr. Maḥmūd 'Alī on behalf of the respondent, did not seriously contest the concurrent findings of the trial Judge and the Appellate Bench, that the marriage of the complainant with Christa Renate Sonntag, solemnized in England, was valid. This view we consider to be plainly right on the facts of this case.²⁰

Suggestion :

Happy companionship, mutual solace, satisfaction, love and kindness are some of the objects of marriage which, sometimes, prove difficult to be achieved in the absence of social, cultural and moral adjustments. Marriage of a Muslim with a *kitābiyyah* has been held to be undesirable mainly because of such differences. Besides, there is the political interest of a Muslim State. In the present-day world, Muslims stand over-powered by non-Muslims almost in every field of life. The Caliph 'Umar had asked *Hadhayfah* to divorce his *kitābiyyah* wife in the interest of Muslim society; although at that time Islam was ruling and emerging out as a Great Power in the world, both on political as well as moral plain. In the present-day context, it is all the more necessary that Muslim States should at least issue prohibitory orders to their servants restraining them from marrying Jew & Christian ladies of non-Muslim States.

²⁰Pakistan Legal Decisions, 1963, Supreme Court, p. 51.

Marriage of a Muslim male with a kitabiyyah in Pakistan :

The Christian Marriages Act, 1872 regulates the solemnization of marriages of Christians domiciled in Pakistan. It is, thus, stated in the Pre-amble of this Act that it relates to the solemnization of the marriages of persons professing the Christian religion, but part of the Act also applies to the marriage where one person may be a Christian and the other a non-Christian.

According to Section 4, Christian Marriages Act, 1872, as adopted by Adaptation of Central Acts and Ordinances Order 1949, (G.G.O. 4 of 1949), every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the Christian Marriages Act, 1872, and any such marriage solemnized otherwise than in accordance with the provisions of the said Act shall be void. Section 5 of the said Act lays down that such marriage may be solemnized in Pakistan—

1. by any person of the Church of Scotland, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister;
2. by any Clergyman of the Church of Scotland, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;
3. by any Minister of Religion licensed under this Act to solemnize marriages;
4. by or in the presence of a Marriage Registrar appointed under this Act;
5. by any person licensed under this Act to grant certificates of marriages between Native Christians.

It is apparent from the above provisions of law that if a Muslim in Pakistan marries a Christian woman it is obligatory that his marriage be solemnized under the provisions of the Christian Marriages Act, 1872, and if such marriage is not performed according to that Act, the marriage shall be void. Further, according to Section 68 of the said Act, "whoever, not being authorised by Section 5 of the Act to solemnize marriage, solemnizes or professes, in the absence of a Marriage Registrar of the District in which the ceremony takes place, to solemnize a marriage between such person, one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to 10 years, or (in lieu of a sentence of imprisonment for 7 years or upwards) with transportation for a term of not

less than seven years, and not exceeding 10 years, and shall also be liable to fine."

In the case of *Zarina Tassadaq Hussain Vs. Qazi Tassadaq Hussain*,²¹ the question arose as to the validity of the marriage of a Muslim with a Christian woman not solemnized in accordance with the provisions of Section 5 of the Christian Marriages Act, 1872. In this case, Mst. Zarina was a Christian at the time of marriage. She later on accepted Islam. The marriage between the parties took place on 16th October, 1934 in *Bādshāhī* Mosque, Lahore, according to Muslim rites and the *Nikāḥ* was performed by the Imām of *Bādshāhī* Mosque. According to Islāmic Law a Muslim could marry a Christian woman and there was nothing in the Islamic Law to prevent such marriages from being solemnized according to Muslim rites. But section 5 of the Christian Marriages Act of 1872 has altered or superseded the pure Islamic Law and such marriage according to the provisions of the above Act would be void, if it is not solemnized in accordance with the provisions of the said Act.

In an earlier case in undivided India it was also held that "a marriage ceremony performed according to Mohammadan rites between a Christian man and a Mohammadan woman can create no valid marriage between the parties." 1904 AWN 213 (219, 220, 221) (DB).

It is a pity that, after a constitutional guarantee that the laws of Pakistan would be in conformity with the Qur'ān and *Sunnah*, such laws as the Christian Marriages Act, 1872, Divorce Act, 1869 and other like laws affecting Muslims, still stand on the statute book of the Islāmic Republic of Pakistan. The law-making machinery of Pakistan, inspite of a decision of our High Court, (*Zarīna Tassadaq Hussain Vs. Qāzi Tassadaq Hussain* reported in PLD 1953, p. 112) appears to have made no move so far in this direction.

Suggestion :

In the light of the above discussion, it is suggested that Section 4 of the Christian Marriages Act, 1872 may suitably be amended so as to avoid the above situation. In view of the present writer the word "one or" occurring in line 1 and "is or" and "a Christian or" in line 2 of Section 2 and the words "one or" and "professes or" occurring in line 2 of Section 27 and the words "persons one or both of whom is or one a Christian or" occurring in lines 4 & 5 of Section 68 and line 2 of Section 69 be deleted so as to save marriage between a Muslim male and a Christian female solemnized according to Muslim rites. It should, however, be clearly specified in the pre-amble of the Act that the provisions of the Act shall be applicable only to marriages of the persons both of whom are Christians.

²¹Pakistan Legal Decisions, 1953, Lahore, p. 112.

The present writer hopes that the Christian Marriages Act, 1872, and Divorce Act, 1869 and such other like Acts would soon be so reviewed that they may not come in conflict with the provisions of Islāmic Law in its proper form and spirit.

Section 8. Marriage contract of a Muslim male with an infidel female or with an idolatress is unlawful.

Marriage with
infidel woman

Provided that on cohabitation in doubt, the marriage contract shall be governed by the rules of irregular marriage. On the irregularity becoming known, separation between the spouses shall be incumbent. If the spouses do not separate of themselves, the court shall get them separated and it shall be permissible to impose punishment upon them.

COMMENTARY

Allāh has forbidden Muslims from contracting marriage with infidel women by saying in the Holy Qur'ān,²² لَا تَزْكُوا الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا i.e. do not marry unbelieving women (idolaters) until they believe.

Marriage contract with a fireworshipping woman or idolatress has been stated in all Hanafī books of *fiqh* to be invalid. Likewise marriage contract with star worshipping woman, having no faith in a Revealed Book, has been stated to be invalid²³.

Of the modern commentators, Muḥammad Yūsuf, in his book²⁴ states that the marriage contract with an infidel woman or with an idolatress is invalid. However, Wilson writes, "If a Muslim man is married to an infidel woman the marriage will not be void *abinitio*; it would rather be irregular. If cohabitation takes place the wife would be entitled to get her dower

²²Al-Qur'ān, Sūrah Al-Baqarah, (The Cow), II:221; Qādrī Pasha: *Aḥkām al-Ṣar'iyyah fi'l Aḥwal al-Ṣakhsiyyah*: Egypt, Sec. 32.

”لَا يَحِلُّ نِكَاحُ الرِّثْيَانِيَّاتِ وَلَا الْمَجُوسِيَّاتِ وَلَا الصَّابِئَاتِ الْآتِيَّ بِعَبْدِنِ الْكَوَاعِبِ وَلَا يُونُ بِكِتَابِ مَنْزِلٍ“

²³Al-Qudūrī, Abul Hasan : *Al-Mukhtasar*, Qur'ān Mahal, Karachi, p. 148; Al-Marghīnānī; Burhān al-Dīn: *Hidayah*, Muḥtabā'ī Press, Delhi, *Kitāb al-Nikāh*, vol. i, p. 290; Qāḍī **K**han: *Fatawa Qāḍī **K**han*: Dehli, vol. i, p. 169; Al-Nasafī, Maḥmūd: *Kanz al-Daqa'iq*, Muḥtaba'ī Press, Delhi, p. 98-99:

”وَحَرْمُ تَزْوُجٍ وَلِلْمَجُوسِيَّةِ وَالْوَثِيَّةِ“

²⁴Mohammadan Law, vol. ii, p. 115.

(fixed or proper, whichever be less) and the issues shall be legitimate".²⁵ Mulla referring to the case, "*Ehsan Hasan Vs. Pannalal*" (A.I.R. 1928, Pat. 19) says that marriage with an infidel woman is merely irregular.²⁶ However, Qādrī Pashā of Egypt holds marriage with an idolatress void.²⁷

Ballie also at page 40 of his book writes that such a marriage contract is invalid but at page 153, expressing his opinion, states that the contract in itself is not invalid, the objection to the contract may be removed by change of religion.²⁸

In the opinion of Syed Amīr 'Alī, a Muslim man may marry a Hindu woman. He in this context cites cases of Mughal Emperors, who contracted marriages with Rājput ladies. According to him the prohibition of marriage with an infidel woman in its characteristic and effect is a relative one and does not spell out voidance. Hence, according to Amīr 'Alī, a Muslim if he marries an infidel woman, the marriage will only be irregular. It will not affect the legitimacy of issues as the infidel woman may at any time accept the faith of Islam; the prohibition shall at once be removed making the marriage valid.²⁹

Here a question arises as to what is the actual impediment in such marriage which Amīr 'Alī argues should be removed. Obviously, it is the infidelity (non-acceptance of Islām) of the woman. If that be the position it will necessitate its removal before the marriage is to take place.

It will be interesting to note here that according to Islāmic Law cohabitation even with one's infidel slave girl is illegal.³⁰ Obviously, therefore, there can be no propriety of contracting marriage with an infidel woman without her accepting the faith of Islām first.

Marriage contract with an infidel woman, before she has accepted the faith of Islām, has clearly been forbidden in the Holy Qur'ān. Hence, mere acceptance of the faith is the condition precedent.

Court's view point :

So far as the Indo-Pak courts are concerned, they are inclined towards holding the marriage contract with an infidel woman as irregular. In the

²⁵A Digest of Anglo-Mohammadan Law, 6th ed. p. 114.

²⁶Principles of Mohammadan Law, XV Ed. p. 227.

²⁷Qādrī Pashā, op. cit. (Eng. Tr. Institutes of Mohammadan Law, Lahore) Article 134, p. 82.

²⁸Digest of Mohammadan Law, Lahore.

²⁹Muhammadan Law, 5th Ed. p. 282.

³⁰Fatawā Ālamgīriyyah, op. cit. vol. ii, p. 8; Ibn 'Ābidīn: *Radd al-Muhtār*, vol. ii, p. 297.

above noted case, “*Ehsan Hasan Vs. Pannalal*” a Hindu woman without accepting the faith of Islām got herself married with a Muslim male and from the marriage had several issues. The Patna High Court held that the marriage contract was irregular and the children were legitimate.³¹

In fact, this decision is on the basis of consummation having taken place. Doctors of Muslim Law are, however, unanimous on the point that the parties to marriage contract in such cases must separate. They hold the issues to be legitimate only on the basis that the act of cohabitation in the case does not definitely come within the definition of adultery. As the lineage of the children is established from the male, the father being a Muslim, the marriage “in form” was found to be there and the children were, thus, held to be legitimate.

Section 9. Marriage contract of a Muslim female with an infidel, polytheist, believer in a revealed book or non-Muslim male is unlawful.

Marriage
with non-
Muslim male

COMMENTARY

Allāh has laid down in His Holy Book “لا تنكحوا المشركين حتى يؤمنوا”

“Nor marry (your girls) to unbelievers until they believe”³²

All the doctors of *Shari‘ah* are unanimous on the point that a contract of marriage of a Muslim female with a polytheist male is not valid.³³ This injunction is applicable in both the circumstances whether consummation has or has not taken place. Consequent upon such marriage contract, even in case of consummation, neither the legitimacy of the issues shall be established nor the term of probation (waiting period) on separation shall become incumbent upon the female, as the contract shall be unlawful *ab initio* and void in all respects.³⁴ Baillie has called such a marriage “Irregular”, on the analogy of marriage contract of a Muslim male with a polytheist female.³⁵ This view is against the *naṣṣ* (text) of the Holy Qur’ān and not correct.

Here a question may arise as to why a distinction is made by injunctions between the effects of marriage contract of a Muslim male with polytheist female and the marriage contract of non-Muslim male with Muslim female

³¹All India Reporter, 1928, Patna.

³²Al-Qur’ān, Surah *Al-Baqarah*, (The Cow), II 221.

³³Fatāwā ‘Ālamgīriyyah: op. cit. vol. ii, p. 8.

“لا يجوز تزوج المسلمة من مشرك ولا كتابي”

³⁴Al-Ḥaṣḥafī, ‘Alā‘ al-Dīn: Al-Durr al-Mukhtār on the margin of Radd al-Muhtār, vol. ii, Chapter on Proof of Legitimacy, p. 650.

“نكح كافر مسلمة فولدت منه لا يثبت النكاح فيه ولا تجب العدة لانه نكاح باطل”

³⁵Digest of Mohammadan Law, p. 153.

when apparently the words of each of the two Qur'ānic verses (11 : 221)³⁶ are similar ? The reason is that though the words of each of the two Qur'anic verses are similar, diversification is bound to take place in details of practical application because of the basic juristic conceptions of Islām. There is a tradition reported from the Holy Prophet to the effect that "the child follows the religion of that one of his parents who professes the better faith". Another point to be noted is that in such cases the question of determination of the child's parentage may also arise. Consequently, the connubial relationship may attract the provisions of an irregular marriage concerning dower, 'iddat, (waiting period) maintenance etc. Therefore, if the husband is a Muslim, the father's faith will govern the child's. When the father is non-Muslim and the mother is a Muslim the implications, certainly, shall be different. As it is a settled fact, from Islamic point of view, that Islam is superior to all other religions, the male being a non-Muslim has no religious superiority over a Muslim female; rather the female in respect of religion is superior to the male. By accepting the legality of a non-Muslim father's marriage to a Muslim mother through recognising the child's legitimacy, a non-Muslim shall get superiority over a Muslim female. Marriage contract, on this logic, shall not be accepted as having come into existence even in form. That a Muslim female be considered inferior to a non-Muslim male would be against the very principles of Islāmic laws.

Modern Legislation—Marriage with non-Muslims :

In several countries of the Muslim world the provision of law relating to the marriage between Muslim woman and a non-Muslim has been codified. The *Ottoman Law of Family Rights*, 1917, as currently in force in Lebanon declares the marriage of a Muslim woman with a non-Muslim man as void (*bāṭil*) (Sec. 7C). This provision of law is also retained in the Jordanian enactment of family law (Article 29). In Turkey and Cyprus too the marriage between a Muslim woman and a non-Muslim is prohibited. A marriage shall, however, be invalid or void only by the judgment of a Court declaring such marriage as invalid or void, as the case may be (Sec. 17). Sec. 48 of the Syrian Law of Personal Status, 1953 also states that "Marriage of a Muslim woman with a non-Muslim shall be void". In the Iraqi Law of 1959 it has been enacted that Marriage of a Muslim with a *kitābiyyah* is valid, but that of a Muslim woman with a non-Muslim is not permitted (Sec. 17).

³⁶Al-Qur'ān, Sūrah *Al-Baqarah*, II : 221,

"لا تتكحوا المشركات حتى يؤمن لا تتكحوا المشركين حتى يؤمنوا"

CHAPTER III

Validity of Marriage (Nikah)

Section 10. Every Muslim of sound mind and having attained majority is competent to enter into a contract of marriage without the intervention of a guardian. In the event of a female contracting marriage with a socially unequal person (*Ghayr Kufw*) or for inequitable dower, her guardian, however, is entitled to get the marriage contract annulled through a competent court of law.

COMMENTARY

There is a unanimity among Muslim Jurists on the point that a major male of sound mind is himself entitled to and capable of contracting his marriage. Similarly, a *thayyibah* (a woman having already experienced married life and then divorced or widowed) is entitled to contract her own marriage. There is, however, a difference of opinion among the doctors of *fiqh* about the capacity of a virgin, of sound mind and major to contract her own marriage. According to Imām Abū Ḥanīfah and to the final finding of Ṣāhibayn, (a term indicating his two most famous disciples, Imam Abū Yūsuf and Muḥammad al-Shaybānī) a female, who is virgin, of sound mind and major, is entitled to contract her own marriage without the intervention of a guardian.¹

The Shī'ah Imāmiyah sect is also in agreement with the view of the Aḥnāf (sing. Ḥanafī) but according to Malikī, Ṣhafi'ī and Ḥanbalī schools of *fiqh*, a female who is virgin, of sound mind and major cannot, without the intervention of a guardian, contract her marriage herself. The views of the respective schools of law are detailed below:—

¹Nasafī, Mahmūd: *Kanz al-Daḡw'iq*, Muṭtaba'ī Press, Delhi, p. 100; Al-Qudūrī, Abul Hasan: *Al-Mukhtaṣar*, Qur'ān Maḥal, Karachi, p. 148—49; Ibn Qudāmah Al-Maqdisī (d. 620 A.H.): *Al-Mughnī*, Cairo, vol. vi, p. 449; Qadrī Pashā: *Al-Aḥkam al-Shar'iyyah fi'l Aḥwāl-al-Shakhṣiyya*, Cairo, Section 34:

”وليس الولي شرطاً لصحة لكاح الحرة العاقلين البالغين بل ينفذ تكاحهما بغير ولي“

The Hanafi View :

Al-Sarakhsī (d. 483 A.H.) in his famous work, "*Al-Mabsūṭ*" writes, "It is stated from 'Alī b. Abī Ṭālib that a woman herself got her daughter contracted into marriage. Afterwards, when her guardians learnt about it they raised their objection to such a marriage before the Caliph 'Alī. He, however, held the marriage to be valid". This decision signifies the fact that a woman contracting her own marriage or who authorises someone, other than her legal guardian, to get her contracted into marriage and that someone, as her *vakīl* or attorney, gets her so contracted into marriage the marriage shall be regarded as valid. On the basis of this *athar*, (assertion or averment of a Companion), Abū Ḥanīfah has inferred the principle that a virgin, or a divorced and widowed woman (*ṭhayyibah*) can contract her own marriage herself; such a marriage, according to this clear precedent, shall be valid, even though the husband is not her social equal. But if the husband is not a social equal, the guardian shall have the right of raising objection to the marriage and get it rescinded through the court. According to an earlier opinion of Imām Abū Yūsuf, if a female, in spite of her guardian's presence, contracts herself into marriage whether with a social equal or otherwise, the marriage shall be invalid. He later on, resiled from this position of his and maintained that the marriage shall be valid, only if the husband is her social equal (*kufw*). Abū Yūsuf, however, resiled from the latter assertion as well and (finally) maintained that the marriage, contracted, whether with a socially equal or otherwise, shall be valid. According to Imām Muḥammad al-Shaybānī a marriage contracted by a female herself either with a socially equal person or otherwise shall remain in abeyance till it is assented to by her guardian. The marriage, on obtaining the assent of her guardian, shall become valid. If the assent is refused the marriage shall become null and void. If the husband is her social equal and the guardian refuses to give his assent to the marriage contracted by her, the matter shall be referred to the court of a *Qāḍī* (Judge), who would get the marriage performed *denovo*. According to Imam Mālik and Ṣhāfi'i, if a female contracts her own marriage it is in every respect void. That is to say, it shall not at all take effect. According to the said Imams, no marriage gets contracted on the words of a female whether it is contracted for herself or for her daughter or is contracted through some other person acting as her agent (*vakīl*) at marriage. In none of the events, the marriage shall get contracted.²

'Alā'al Dīn Abū Bakr b. Mas'ud Al-Kāsānī (d. 587 A.H.), another renowned Ḥanafī jurist, elaborately discussing the point in his book, "*Bada'i'al-Ṣana'i*" writes, "According to an earlier formulation of Imāms—

²Al-Sarakhsī : *Al-Mabsūṭ*, Cairo, 1324 A. H., vol. v, p. 10.

The Maliki View :

There have been reported a number of assertions from Imām Mālik, regarding the guardianship in marriage being compulsory. Accordingly, Ibn Rushd in his book, "*Bidāyat al-Mujtahid*" has stated that no marriage contract, in accordance with Aṣḥab's narrative from Mālik, can be made without the guardian's permission. Ibn al-Qāsim has, however, narrated another assertion of Mālik, according to which the stipulation regarding guardianship is merely conventional; it is not obligatory. According to him, therefore, a male and female if they contract themselves into marriage without the guardian's permission and one of them dies, the survivor will be the legal heir of the deceased. It means that a female's marriage may be contracted, according to Mālik, without her guardian's permission, but the same shall be irregular or defective which may be regularised by obtaining consent of the guardian to it. That is to say, the stipulation with regard to guardianship is merely with the purpose of completing the marriage (in all respects), not for validating it.⁴

Mālik in his book, "*Muwatṭā'*" (strictly, *Mu'aṭṭā'*) relates several traditions from the Holy Prophet. The first is from Ibn 'Abbās to the effect that the Holy Prophet has said that a woman with marriage experience (*ṭhayyibah*) has greater authority over self than her guardian, that consent shall be taken from virgin and that her silence shall amount to her consent⁵. Malik concludes from this tradition that a guardian has no compulsive or imperative authority over a woman with marriage experience (*ṭhayyibah*) but the guardian has a compulsive authority over a virgin.

Mālik relied on one more tradition narrated by Sa'īd b. Al-Masayyib that 'Umar said, "there shall be no marriage contract of a woman performed except with her guardian's permission or with the consent of her family members of sound opinion or with the consent of (in the absence of her guardian) an Official of the time.⁶ Muḥammad Al-Shaybāni, discussing

⁴Ibn Rushd, Imām Abu al-walīd Muḥammad b. Aḥmad Al-Qurṭubī (d. 595 A. H.): *Bidāyat al-Mujtahid*, Cairo, 1960, vol. ii, p. 8.

"اختلف العلماء هل الولاية شرط من شروط صحة النكاح ام ليست بشرط؟ فذهب المالک الى انه لا يكون نكاح الا بولي وانها شرط في الصحة في رواية اشهب عنه وبخرج علي رواية ابن القاسم عن مالک في الولاية فكانه عنده من شروط التمام لان شروط الصحة"

⁵Mālik b. Anas (d. 179 A.H.): *Muwatṭā'* with its commentary by Zarqānī, Cairo, 1382 A. H., vol. iv, page 8, (*Kitāb al-Nikāḥ*) :

"عن عبد الله بن عباس ان رسول الله صلى الله عليه وسلم قال : الايم احق بنفسها من وليها والبكر تستاذن في نفسها واذنها صمايتها"

⁶Ibid :

"عن مالک انه بلغه عن سعيد بن المسيب انه قال عمر بن الخطاب لا تنكح المرأة الا باذن وليها او ذوى الراى من اهلها او السلطان"

the above tradition, has, in his book, which is also called "*Muwaṭṭā*" (Strictly, *Mu'atṭā*) related an opinion of Imām Abū Ḥanīfah to the effect that the marriage contracted by a woman with her social equal but on equitable dower is valid. Imām Abū Ḥanīfah's view regarding the above tradition is based on Caliph 'Umar's words, "If the marriage is contracted with the consent of a family member of sound opinion, it will be valid," though the said family member may not be her guardian. According to Abū Ḥanīfah the words used by 'Umar meant that a woman may not reduce her proper dower. If she has not remitted her proper dower and has contracted marriage with her social equal (*Kufw*), the purpose was served, and the marriage would be valid.⁷

Imām Mālik, in his aforesaid book, "*Mu'atṭā*" has also reported two other traditions. The first relates to Muḥammad b. Qāsim and Sālim b. 'Abdullah. They used to get their virgin daughters married without obtaining their consent. The other tradition relates to Muḥammad b. Qāsim, Sālim b. 'Abdullah and Sulayman b. Yasār. They maintained that if a virgin woman is contracted into marriage without her consent having been obtained, it shall be deemed to be effective.⁸

Conclusion :

If each of the two traditions be examined in the light of the social background of Medina, it shall become apparent that these traditions merely indicate the general custom and usage in vogue in Madina. The consent and permission of a guardian as a condition precedent to a valid marriage contract cannot be put forward as an explicit religious mandate.

In the light of the above analysis it may be concluded that Mālik considers the permission of a guardian necessary for the completion of a contract of marriage and not for validating it. Ibn Al-Ruṣṣd and other Egyptian Mālikī jurists appear to conform to this view. Mālikī jurists of

⁷Muḥammad Al-Shaybānī: *Muwaṭṭā*, Karachi, p. 244, (*Kitāb al-Nikāḥ*):

"قال محمد فاما ابوحنيفة فقال اذا وضعت نفسها في كفاعة ولم تقصر في نفسها في صداق فالنكاح جائز ومن حجته قول عمر في هذا الحديث "او ذوى الرأى من اهلها" انه ليس بولى وقد اجاز نكاحه انما لانه اراد ان لا تقصر بنفسها فاذا فعلت هبى ذالك جاز"

⁸Imām Mālik b. Anas, op. cit., vol. iv, p. 9.

"عن مالك انه بلغه ان القاسم بن محمد وسالم بن عبدالله كانا يتكلمان بنتهما الابكار ولا يستاء سرانهن"

"عن مالك انه بلغه ان القاسم بن محمد وسالم بن عبدالله وسليمان بن يسار كانوا يقولون فى البكر يزوجهن ابوها بغير اذنهن ان ذلك لازم لها"

Iraq, however, hold that the permission of a guardian is a condition precedent to a valid contract of marriage.

Al-Shafi'i's Point of View :

As far as Imām Shāfi'ī is concerned, it is stated in his book, "Al-'Umm"⁹ that the marriage of a woman, who contracts her marriage without the consent of her guardian, shall not take effect in as much as the Holy Prophet has said that such a marriage contract is void.

Al-Shāfi'ī derives support for his view from the following verses of the Holy Qur'ān : "When ye divorce women, and they fulfil the term of their 'iddat, do not stop them from marrying their (former) husbands, if they mutually agree on equitable terms."¹⁰

Imām Shāfi'ī argues, when Allāh, in this verse, forbids guardians from interfering in contracts of marriage effected by such females, the existence of such authority of the guardians for getting the marriage of women contracted becomes established. Hence, the verse according to him, proves that marriage contract of a woman made without the authority of her guardian is not valid. Because, had the guardian no such authority it was pointless to prohibit its exercise. The argument of Imām Shāfi'ī, however, appears to have been based on a fallacy, because an order that directs one to desist from an act is a negative one; it expresses a negation of authority and not an affirmation or presence of authority. He assumes a positive order from a negative one which is not correct.

The second verse which Imām Shāfi'ī cites, "Marry those among you who are single"¹¹ Imām Shāfi'ī argues that Allāh, in this verse, has addressed the guardians and the word "ayyim" is a noun which means a woman who has no husband, be she virgin or a woman with marriage experience. When guardianship is constituted over an unmarried woman (both a virgin or a non-virgin marriageable woman) and she becomes a ward, how can she, then, turn into a guardian herself ?

In rebuttal of this argument, the Ḥanafi jurists maintain that the verse with reference to context has been addressed to the 'Ummah generally and not to the guardians alone. Hence, Imām Shāfi'ī's contention that mandate to guardians for getting the unmarried women contracted into marriage proves the guardian's authority with respect to contracting marriages is at

⁹Imām Shāfi'ī *Al-Umm*, Cairo, 1321 A.H., vol. v p. 12 & 13.

¹⁰Al-Qur'ān, sūrah *Al-Baqarah* (The Cow), II : 232,

"فلا تعضلوهن ان ينكحن ازواجهن اذا تراضوا بينهم بالمعروف"

¹¹Al-Qur'ān, sūrah *Al-Nūr* (The Light), xxiv : 32,

"وانكحوا الايامى منكم"

best ambiguous. Even if it is accepted that the guardians, in this Qur'ānic verse, have been addressed to in this connection, it does not prove that the guardian's sanction is a condition for the validity of a marriage contract. The matter has merely been stated as a custom and convention prevalent among the people. Girls, commonly, do not themselves contract their own marriages. For doing so themselves, they have to be in social contact and be intimate with men, which would not be socially acceptable. That is exactly why, in the marriage of adult virgins, the presence or consent of guardians is desirable but not incombent. The second part of this verse is a pointer to it. God, in this verse, says that get married "the virtuous ones, among your slaves, male or female".¹² In no way can this verse be interpreted to mean that only those slaves are to be contracted into marriages who are virtuous. The verse is of general import and meaning. It does not mean that goodness and virtue are the conditions of the validity of marriage. Similar is the case with the Qur'ānic verse, "And if any of your slaves asks for a deed in writing (to enable them to earn their freedom for a certain sum), give them such a deed if ye know any good in them".¹³ From this, it does not follow that an agreement made with bondsmen to place them under contract of *kitābat* does depend on the cognition of good in them alone.

Imām Ṣhafi'ī in support of his argument also mentions two other Qur'ānic verses (i) "Wed them with the leave of their owners"¹⁴ and (ii) "Men are the protectors and maintainers of women".¹⁵ These verses too do not support the contention of Imām Ṣhafi'ī. The first verse deals with the marriage contract of female slaves. It does not deal with the marriage contracts of free, prudent and mature women, with whom we are presently concerned. The second verse does not deal with the authority of a guardian in contract of marriage; rather in a way, it treats of the general superiority of men over women.

¹²Ibid:

“والصالحين من عبادكم و امائكم”

¹³Ibid, xxiv : 33,

“فكانت و هم ان علمتم فيهم خيرا”

In *Shari'ah* slaves are of different categories : one of them is *Mukātab*. He is one who enters into a contract of emancipation with his master such as that on payment of a certain sum he would earn freedom. After such a contract he is allowed to earn during bondage in order to pay the price of his freedom.

¹⁴Al-Qur'ān, sūrah Al-Nisā, (The Women), IV : 25,

“فانكحوهن باذن اهلهن”

¹⁵Ibid, iv : 34,

“الرجال قوامون على النساء”

Imām Shafi'ī and other Imāms of Shafi'ī school, in support of their view that marriage by a female without the leave of her guardian is not valid also quote the following traditions of the Holy Prophet :

1. It is narrated from 'Āishah that the Prophet has said, "The marriage of a woman, who contracts it without the consent of her guardian, is void, void and void; and the man who cohabits with her has to pay the dower in consideration of her sexual organ becoming lawful to him. In case of dispute, the Ruler is the guardian of those who have no guardian."¹⁶

2. Ibn 'Abbās has narrated a tradition of the Prophet, "That marriage contract is adultery which lacks four attributes, viz. the one who addresses, the guardian and two just (reliable) witnesses."¹⁷

3. Another tradition of the Prophet has also been reported through Abū Hurayrah that "No woman ought to get any woman contracted into marriage or contract her own marriage and the woman who enters into marriage contract herself is an adulteress."¹⁸

4. There is another tradition reported from 'A'ishah that she used to be present in person at marriage congregations, proposed marriage contracts and then asked any man present to get the marriage contract performed, in as much as women do not do it.¹⁹

5. There is one more tradition handed down from 'Āishah that "there is no marriage contract except that (contracted) by a guardian and the one who has no guardian, has the Ruler as guardian."²⁰

6. There is also a tradition narrated by Mu'ādh b. Jabal, "The woman who herself contracted her marriage is an adulteress (or said something like this)."²¹

Criticism :

All the traditions, which form the basis of the arguments of Imām Shafi'ī and those of other Shafi'ī 'Ulama are considered to be weak by the Ḥanafī traditionists. So far as the first tradition is concerned, it is based on Zuhri's narrative. Ibn Jurayj states, "when he met Zuhri and placed the

¹⁶Zayl-ī, Jamāl al-Dīn (d. 762 A. H.) : *Naṣab al-Rōyah*, Dābhel, (India), vol. iii, p. 184.

¹⁷Al-Sarakhsi : *Al-Mabsūt*, Cairo, vol. v, p. 11.

¹⁸Ibid.

¹⁹Ibid.

²⁰Ibn Mājah : *Al-Sunan*, Karachi, p. 135.

²¹Dār Qutnī : *Al-Sunan*, Hejaz, 1966 A. D., vol. iii, p. 227.

tradition before him, he remembered it not and disowned it".²² This non-acceptance is the basis of the weakness of the tradition. The objection, however, has been explained away by different traditionists. Ibn Ḥabbān, for instance, has said in his "Ṣaḥīḥ" that someone's forgetting his own narrative is no proof that it is incorrect, as it often does happen that a person after the narration forgets all about it.²³

Ibn Ḥazm, likewise, has in his renowned book, "Al-Muḥallā" stated that Ibn Jurayj is a pious traditionist and Sulayman Mūsā has stated that the tradition was narrated to him by Zuhri. The tradition, therefore, should be taken as authentic as two persons transmitted it onward to others, although Zuhri himself might have forgotten it.²⁴ But the circumstances here are a bit different. Zuhri's denial was accompanied with a prayer for the forgiveness of those who narrated the tradition. The question is not merely of forgetfulness but that of the correctness of a tradition. Besides, Zuhri himself holds the marriage contract without the mediation of a guardian as valid. Moreover, the word *bātil* (void) that has been used in the tradition conveys the sense of the word *fāsid* (irregular). If the marriage contract, in the absence of guardian's consent is void, that is, a nullity *abinitio*, "hadd" punishment would have been inevitable for the man and the woman, as the act of cohabitation gone into would have amounted to adultery. But holding the marriage contract to be void and directing for the payment of dower is a proof of the fact that, according to him, the marriage contract is *fāsid* (irregular) and not *bātil* (*abinitio* void). It may, therefore, be inferred that it may be validated by subsequent consent of the guardian.

In the second tradition, Ibn Maysir Abū Khatīb is *majhūl*, i.e. deficient in authenticity. That is why the Aḥnāf do not acknowledge the correctness of this tradition. The third tradition has been expounded in two different ways by Dār Quṭnī. One has the testimony of Jamīl al-Hasan and the other has that of Muslim b. Abi Muslim. Both being unknown personalities, their authority is unacceptable.

The Aḥnāf consider the fourth and the fifth *aḥadīth* also as unreliable and maintain that 'Ā'ishah was convinced of the validity of marriage contract entered into without the intercession of the guardian. In its support it is narrated that 'Ā'ishah got contracted the marriage of her niece, the daughter

²²Al-Kāṣānī, 'Ala' al-Dīn (d. 593 A. H.) : Badai' al-Ṣanā'i, Cairo, vol. ii, p. 249.

²³Ibid.

²⁴Al-Muḥallā, Cairo, vol. v, p. 493.

of her brother, Abdul Raḥmān (son of the Caliph Abū Bakr) with Munzir b. Zubayr, while Abdul Raḥmān was away in Syria. Consequently, the tradition not acted upon by herself cannot be put forth as a proof of the fact that it is a religious mandate or that it is obligatory in nature. Moreover, it is stated by some of the traditionists that the tradition, “لا نكاح الا بولي” “No marriage contract without the intercession of guardian” is one of the three traditions which are not properly traced to the Holy Prophet and has not, therefore, been reported by either Bukhārī or Muslim in their “*Ṣaḥīḥ*”. The sixth tradition has been called as obsolete by Dār Qutnī.

Although some traditionists have answered the objections raised above, but these traditions, undoubtedly, are not free from criticism. As against this the traditions from the “*Ṣaḥīḥayn*” (the two most authentic collections of *aḥādīth* by Imām Bukhārī and Imām Muslim) specially that reported of Ibn Abbas, proves that the ward has greater authority over her own self than the guardian.²⁵

Conclusion :

A guardian, therefore, has no compulsive authority over a prudent and a mature woman. This is apparent from those traditions which stated that the marriages of virgins and of major women got contracted by their guardians were, on the complaint of those women, annulled by the Holy Prophet on the ground that the guardians had no compulsive authority over the women.

Imam Shafi'i and Qiyas :

Imām Shāfi'ī, in support of his contentions, applies Qiyās as well. He says that by the nature of things, the marriage contract, in effects and consequences, is a cause of injury as it is a sort of slavery. This is so, he holds, in as much as the husband acquires the right of unrestricted enjoyment of her person and the right of pronouncing a divorce at will while at the same time that of restricting her movements and depriving of the right to marry another person, if she so likes, during his own life-time.

The assertion of Imām Shāfi'ī that the contract of marriage is an injurious contract is untenable. The fact is that a marriage contract has its benefits and blessings sacred and worldly, such as peace, love, partnership, establishment of children's paternity and protection from adultery. The wife is provided with all the necessities for the rest of her life—a position that can not be attained without the wife's entirely submitting herself to her husband. The proprietary right, in its limited sense, that the husband has over the wife is in accord with the necessity of realisation of benefits and expediencies for the couple that may accrue. The limited proprietorship of the husband

²⁵Bukhārī : *Ṣaḥīḥ*, Kitāb al-Nikāḥ; Muslim : *Ṣaḥīḥ*, Kitāb al-Nikāḥ.

is a means of the attainment of privileges and benefits; and anything which confers advantages of this order must be classed as advantageous. Hence, it is wrong to say that marriage contract is a slavery or that it is an injurious contract. A marriage contract, in fact, can in no manner be called slavery. Marriage is a contract that saves woman from being slave to anyone else.

A woman is possessed of sufficient wisdom, and, on this basis, her authority in her choice of her husband is given due credence. It is, therefore, an accepted fact that a woman when she demands of her guardian that she be given in marriage to a socially equal person, it becomes incumbent upon the guardian to give her in marriage to him.

In the event of the guardian refusing to do so, it has been held lawful for a Qāḍī to act as a guardian and give her in marriage to the man of her choice. It is, therefore, irrelevant to say that woman is fickle-minded and that she does not understand the implications of a marriage contract.

Abu Hanifah's Point of View :

Imām Abū Ḥanīfah, as stated above, holds the marriage, contracted by a virgin who is a major without obtaining consent of the guardian, quite valid.

In support of his view he relies on the Holy Qur'ān, Traditions and the principles of Qiyās. The first argument of Imām Abū Ḥanīfah is based on the verse,²⁶ wherein Allah says that "any believing woman who dedicates her soul to the Prophet if the Prophet, wishes to wed her ; this only for thee, and not for the Believers (at large)." He argues that this verse demonstrates a woman's right of contracting her marriage herself by her own words, as the marriage contract gets performed automatically with the use of the word '*hibah*' (gift). Al-Shafi'i's interpretation of this verse that the marriage contract being effected with the word '*hibah*' (gift) was a personal specific proviso in the case of the Prophet himself is not correct. The distinctness of the proviso in case of the Prophet does not lie in the marriage contract getting performed with the word "*hibah*" but lies in the performance of a marriage contract without proper dower. At the end of the verse, the reason cited for this privilege accorded to the Prophet is his difficult financial position. In fact, the word '*haraj*' occurring in the verse²⁷ is in respect of the non-capacity of paying the dower money, which is intended to be removed by the use of the word "*hibah*".

²⁶Al-Qur'ān, sūrah *Al-Aḥzāb* (The Confederates), xxxiii : 50,
 "وامرأة مومنة ان وهبت نفسها للنبي ان اراد انى ان يستنكحها خالصة لك من دون المؤمنين -"

²⁷Ibid :

"-لكيلا يكون عليك حرج"

The second verse relied upon by Imām Abu Ḥanīfah is, "There is no blame on you for what they do."²⁸ The third verse is "So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her."²⁹ Abu Ḥanīfah bases two arguments on these verses of the Holy Qur'ān. Firstly, both the verses are clearly in favour of woman's right of contracting her own marriage. The second verse also holds, in effect, that a woman's contracting marriage with another person becomes the means of doing away with the prohibition of contracting re-marriage with her first husband. Thus, it is clear that contracting of marriage with another person by a woman is effective. It has also to be noted that the words فعلن (does) and تنكح (marries) in the two verses are verbs indicative of feminine gender and have "women" as their subject.

Another verse of the Holy Qur'ān, "In that case, there is no blame on either of them if they re-unite"³⁰, too, refers to woman's right of contracting marriage without obtaining consent of her guardian. The verse is of double inflection. Man and woman both constitute its subjects. Hence, it appears that both man and woman, can propose as well as accept a proposal of marriage personally without a guardian's consent.

Abū Ḥanīfah interprets in two ways the fifth Qur'ānic verse : "When ye divorce women, and they fulfil the term of their 'iddat do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms."³¹ The first interpretation is that the marriage mentioned in the verse refers to women themselves contracting it in as much as the subject of "ينكحن" is "woman". This proves the validity of marriage contracted, without the intervention of guardian by the words of a woman herself. The second is that the guardians, through this verse, have been forbidden to stop women from contracting their own marriages themselves when both parties to marriage are in agreement in accordance with *Shari'ah*. Opposing this view, it is contended that

²⁸Al-Qur'ān, surah Al-Baqarah (The Cow), ii : 240,

"فلا جناح عليكم فيما فعلن فى انفسهن"

²⁹Ibid, II : 230,

"فان طلقها فلا تجل له من بعد حتى تنكح زوجاً غيره"

³⁰Ibid:

"فلا جناح عليهما ان يتراجعا"

³¹Ibid, ii : 232,

"واذا طلقتم النساء فبلغن اجلهن فلا تعضلوهن ان ينكحن ازواجهن اذا تراضوا

بينهم بالمعروف"

the verse as revealed is in connection with the women's remarrying their own former husbands. This contention, however, is not correct. A Qur'ānic verse, on principle, should be taken to convey a general directive and the occasion of its revelation should be considered of secondary significance.

Traditions:

There are several traditions as well on the lawfulness of marriage contracted without an intervening guardian. It is reported from Ibn 'Abbās that the Prophet said, "A guardian has no authority over a ṭhayyibah,"³² that is, the experience of consummation does abrogate the requirement of guardianship in marriage.

Likewise, there is reported another tradition by Ibn 'Abbās that the Prophet said that an "Ayyim" (a woman, virgin or consummate, who has no husband) has with respect to her person greater authority than her guardian. Consent shall be taken from the virgin and her silence shall mean her consent.³³ These traditions have been narrated by Imām Mālik, Muslim, Abu Da'ūd, Tirmidhī and Nasā'ī.

Besides these, a few instances of the father getting their daughters contracted into marriage against their will were brought before the Prophet. He, on the complaints lodged before him by the daughters against their marriages, annulled the marriages got contracted by their fathers. Such instances are detailed below:—

- (i) Khansā' daughter of Khidhām was got contracted into marriage by her father. She disliked the marriage. Consequently, she appeared before the Prophet and complained about it. He thereupon annulled the marriage got contracted by her father.³⁴
- (ii) It is narrated by 'Ā'ishah that a young girl came to her and said that her father had got her contracted into marriage with his nephew so that his poverty may be removed through that marriage. 'Ā'ishah asked the girl to wait. When the Prophet later heard her complaint, he sent for her father. He, then, in the presence of

³²Al-Kāṣānī, op. cit. vol. ii, p. 248; Zayl'ī : *Naṣab al-Rāyah*, Dābhel vol. iii, p. 172 :

”ليس للولي مع الثيب امر“

³³Imām Mālik : *Muwatta'*, (*Kitāb al-Nikāh*):

”الايم احق بنفسها من وليها والبكر تستاذن فى نفسها واذنها صمايتها“

³⁴Baghawī : *Mishkāt al-Maṣābiḥ* (*Kitāb al-Nikāh*) :

”وعن خنساء بنت خدام ان اباها زوجها وهى ثيب فكرهت ذلك فأتت رسول الله صلى الله عليه وسلم فرد نكاحه“ رواه البخارى وفى رواية ابن ماجه نكاح ابوها-

the father authorised the girl to contract her marriage by her own choice. Thereupon the girl said, 'O' Prophet! verily I give sanction to what my father has done. I had no other intention except that women may know that they had full authority over themselves (in this matter).³⁵

- (iii) Abu Salama Ibn Abdur Rahman narrated that a woman came to the Prophet and complained that her father had got her contracted into marriage with a person whom she did not like. The Prophet told the father of the woman that he had no authority to get her married and asked the woman to go and get herself married with whomsoever she liked.³⁶
- (iv) The Ḥanafīs cite the marriage contract of 'Um Salmah with the Prophet himself in proof of the validity of marriage contracted without an intervening guardian. It is stated that the Prophet when mentioned his desire to 'Um Salmah of contracting marriage with her, she said that none of her guardians was then present. Thereupon the Prophet said, 'There is no one of your guardians who would not approve of your marriage with me'. After this, her marriage contract with the Prophet was performed without the presence of any of her guardians.

In view of these traditions it may easily be concluded that the guardian's presence, approval or consent in the marriage contract of a major virgin woman is not essential and such a marriage will be in essence perfectly valid. Indeed, in a marriage contracted with a socially unequal person and also as per Abū Ḥanīfah, on inequitable dower, the guardian is entitled to get the marriage contract annulled through court.

³⁵Nasā'ī : Al-Sunan, Karachi, vol. ii, p. 63:

”عن عائشة ان فتاة دخلت عليها فقالت ان ابي زوجني ابن اخيه ليرفع بي فسيته و انا كارهة فقالت اجلس حتى ياتي النبي فجاء رسول فاخبرته فارسل اليها فدعاه فجعل الاسر اليها فقالت يا رسول الله قد اجزت ما صنع ابي ولكن اردت ان اعلم النساء من الامر شيئاً-“

³⁶Zayl'i : Naṣab al-Rāyah, Dābhel, vol. iii, p. 182:

”عن ابي سلمة بن عبد الرحمن قال جاءت ا-رة الى رسول الله صلى الله عليه وسلم فقالت ان ابي انكحني رجلاً و انا كارهة فقال رسول الله صلى الله عليه وسلم لا يبيها لانكاح لك اذهبي فانكحي من شئت“

Mullā Miskīn : Cairo, Fath al-Mu'īn, *Kitāb al-Nikah*, vol. ii, p. 26;
Dāmād Afandī : Majma' al-Anhur, Cairo, vol. i, p. 332.

Other Arguments :

Besides the injunction of the Holy Qur'ān and the traditions of the Prophet, even if the question be examined on purely rational basis it would appear that a prudent youth on attaining the age of majority becomes entitled to contract his marriage himself. A girl, in the like manner, on attaining her age of puberty becomes master of her own will. She remains under the guardianship of no one. The authority that a father has in getting his minor children contracted into marriage is a delegated authority under law. A minor by himself is incapable of understanding the implications of a marriage contract. Hence, the marriage got contracted by the father, on the basis of the minor's incapability, would be valid. The incapability of a minor boy is removed with his attaining the age of puberty. The incapability of a girl too, like a boy, is removed on attaining the age of puberty and she remains under the guardianship of no one; rather she becomes the guardian of her own person. Guardianship (the representative capacity) of some persons is established under legal necessity. When the necessity by itself ends, the guardianship (the representative capacity) of that person terminates; hence the father, after his daughter has attained the age of puberty, has no representative authority of a guardian over her.

It is an established fact that a girl on attaining the age of puberty becomes entitled to make use of her property as she likes, and the authority of her father or of any other of her guardians over her property comes to an end. Just as she has the right to deal with her property independently she has the authority of dealing independently in the matter of contracting her own marriage and no guardianship over her subsists. Closely examined, in matters of marriage the guardian has practically no right over the girl who has attained puberty; rather it is the girl who has rights over the guardian. The girl can force her guardian to get her contracted into marriage with a social equal of her own choice. On the contrary, if the guardian tries to get the girl contracted into marriage with a man of his choice, she has the right to refuse it. There is no compulsion for her in such a matter.

Guardian's authority over the girl is based on his capability of providing security and protection. If a girl contracts herself into marriage in an alien family with a person socially unequal her guardian has the right to intervene and to repudiate it on the ground that he would be embarrassed and disgraced. If the girl, however, marries with her social equal the guardian has no right to intervene in as much as the question of embarrassment and disgrace does not arise.

Conclusion :

The conclusion arrived at in the light of the above discussion is that the real parties to a marriage contract are man and woman by themselves and

not their guardians. A major and prudent girl, therefore, has the authority of contracting her own marriage without the intervention of her guardian.

Difference of Opinion :

The difference in views, on this question, among the different schools of *fiqh* is really due to the fact that the verses revealed in the Holy Qur'ān on the subject of guardianship in marriage do not clearly say that the presence or permission of a guardian is an essential condition of the marriage contract of even a major virgin. The traditions which are quoted in this connection, too, are not unambiguous with respect to their text and accuracy. One group of jurists puts forward a few traditions in support of the contention that guardianship is an essential condition for the validity of a marriage contract, whereas the other group relies on traditions conveying that guardianship is certainly not an essential condition for the marriage of a female. The result is that all the verses and traditions that have, in this respect, come down to us are liable to different interpretations. There are differences with regard to their meaning and significance. The views of each one can both be supported and controverted on the basis of some *ḥadīth* material.

In the circumstances, the Qur'ānic verses and the traditions of the Prophet, concerning the competency of a Muslim female contracting her own marriage, as regards their intent, mandatory import and effect or otherwise, become uncertain. Contract of marriage being valid or invalid, according to different schools of *fiqh* thus being controversial, the practice prevailing among Muslims in general may be adhered to, provided it be in conformity with social expedience, as advocated by Islam.

The Correct View :

To conclude, the correct view is that every prudent and major Muslim male or female is, without the intervention of a guardian, competent to enter into his or her contract of marriage. Further, in the case of marriage of a girl with a man of unequal social status³⁷ or on an improper dower,³⁸ her

³⁷The equality of social status means equality of (1) religion (Islam), (2) genealogical standing, (3) liberty, (4) Profession or occupation, (5) Piety, and (6) wealth. This is according to Ḥanafī School of Law. Mālikīs believe in religion (Islam) and piety while Shāfi'īs rely on Islam, genealogical standing, liberty and occupation (profession).

³⁸Insufficient or improper dower implies less than the customary dower. The term 'customary dower' means the dower of the standard granted to such near relations of the woman as her sister, paternal aunt etc.

guardian is entitled to get the marriage dissolved through a competent Court of Law.

Shāfi'ī's view that the women do not possess the aptitude of understanding the realities of a marriage contract and thus the mediation of guardians in their marriage contract is obligatory, virtually amounts to putting an embargo on the exercise of free will on the part of women. It violates their personal rights and liberties. Islamic law, in order to protect and safeguard the Muslim society against trends of disintegration indeed entitles the guardians to file a suit for the annulment of the marriage contract in a Court of Law if a woman contracts a socially unequal marriage without the guardian's consent or on an improper dower provided that in the guardian's own family social equality and proper dower have been observed and maintained for generations together.

Pakistan View :

It was held by Lahore High Court, "the fact that the girl was less than 18 years of age is not an impediment in her way for purposes of entering into a marriage. Every Muhammadan of sound mind who has attained puberty may enter into a contract of marriage. Since *Mst. Iqbal Perveen* is undoubt by more than 15 years of age, she could enter into a valid marriage without interference of her father." (*Mohd. Aslam v. Ghulam Mohd.*; PLD 1971 Lah. 139).

Modern Legislation Relating to Women's capacity :

Finally, on the matter of the conclusion of the contract the traditional Mālikī and Shāfi'ī rule that an adult woman must be given in marriage by her proper guardian still obtains in Sudan and Morocco; although the woman's consent to the marriage is, as a general rule, essential for its validity. In Tunisia, however, a Mālikī woman no longer suffers from this incapacity and may now validly conclude her own marriage contract. It is also noteworthy in this regard that a series of recent judicial decisions in India and Malaya have ratified marriage contracted by Shāfi'ī girls without their guardians' consent on the broad principle that it was admissible to apply the more liberal *Ḥanafī* doctrine in these cases.

Section 11: Marriage contract is constituted by the proposal and acceptance, in the presence of witnesses, of a man and a woman intending to marry each other.

Exception : Among Shi'ahs a marriage needs no witnesses.

COMMENTARY

A marriage contract is constituted by proposal and acceptance.³⁹ The initial words suggesting a marriage contract is called "Proposal" and the words expressing agreement to it is called "Acceptance".⁴⁰ The basic and most important condition of a marriage contract is that there be made a "Proposal" on behalf of one party and its "Acceptance" on behalf of the other. It is stated in 'Al-Kāfi that proposal and acceptance are the pillars of a marriage contract. The initial word, on behalf of whichever party it may be, is called 'proposal' and the positive answer to it on behalf of the other party is called 'acceptance'.⁴¹ In a marriage contract generally the proposal is made on behalf of the woman and acceptance is made on behalf of the man.

For discussion on "The presence of witnesses in marriage", see Commentary of Section 18 *infra*.

Pakistani View :

The essential of valid Muslim marriage is that there should be a proposal made by or on behalf of one of the parties of the marriage and an acceptance of the proposal by or on behalf of the other in presence and hearing of two male or one male and two female witnesses who must be sane and adult Muslims. The proposal and acceptance must both be expressed at one meeting. (*A.L.M. Abdulla v. Rokeya Khatoon*: PLD 1969 Dacca 47).

Only the ceremony called the nikāḥ is known to Muhammadan law for uniting a husband and wife. Betrothal is not known to that system. The moment a woman is married to a person according to the procedure provided for a nikāḥ she becomes his wife, and there is nothing to stop her from going to his house straightway without any drum-beating and other felicitations. The ceremony of having pomp and show at the time of handing over the girl has been grafted on Muhammadan law by custom and legally it has no value at all. The fact that woman was not handed over to the husband with due celebrations would, consequently, not affect the relationship between them created by the nikāḥ or make it an inchoate union requiring some thing else to complete it. (AIR (Vol. 32) 1945 Peshawar 51=222 Ind. Cas 277 (DB). The *rukhsati* ceremony is legally no part of a Muhammadan marriage.

³⁹Al-Qudūrī : op. cit. page 147 ; Nasafī : *Kanz al Daqā'iq*, op. cit. page 97; 'Ubaydullah b. Mas'ūd (d. 747 A. H) ; *Sharh al-Waqāyah*, Muṭtaba'ī Press, Delhi, vol. ii, p. 4 ; Qadrī Paṣḥā, op. cit. Section 5 ; Qānūn al-Aḥwāl al-*Ṣakhsīyyah*, Syria, Section 5.

⁴⁰*Fatāwa 'Ālāmgīriyyah*, op. cit. *Kitāb al-Nikah*, page 1.

⁴¹*Ibid*.

Section 12. The presence of a Registrar, a Qāḍī or a Maulvī
 The Qadi is not essential for solemnising the marriage
 contract.

COMMENTARY

The parties can give themselves in marriage. It is not necessary that some one else should act as an intermediary. No Qāḍī or priest is required for the performance of a marriage. There is no priesthood in Islam. A person who is a guardian or authorised representative of both the parties may himself both make and accept a marriage proposal.⁴²

Section 13. Making and Acceptance of marriage proposal
 Mode of propo- either oral or written are both valid.
 sal & acceptance

Explanation: If the parties, personally or through representatives, be present in the marriage meeting, an oral proposal and acceptance are indispensable; except when to do so, on account of some disability, be not possible.

COMMENTARY

Proposal and acceptance of marriage, both oral and written, are valid. If, however, the parties personally or through representatives be present in the marriage meeting, oral proposal and acceptance are indispensable, except when to do so be impossible on account of some disability.

If a party not being, personally or through representative, present in the marriage meeting an authentic written proposal on behalf of the party instead be placed and read over before the witnesses in that meeting and the other party present in reply expresses his (or her) acceptance, the marriage will be held to have been contracted⁴³. If a messenger be sent and a letter of proposal be written by a man to a woman and she accepts in presence of two witnesses who have heard either the words of the messenger or the text of the letter, the marriage contract would be held to have been concluded, as the proposal and acceptance were made out in the same meeting.⁴⁴ Similarly if a woman tells the witnesses that a certain person

⁴²Al-Kāsānī, op. cit. vol. ii, p. 132-33.

⁴³Qānūn al-Aḥwāl al Shakhṣiyyah, Syria, Section 7.

⁴⁴Al-Kāsānī : op. cit. page 133 ; Fatāwā 'Ālamgīriyyah, vol. ii. p. 2.

has written to her a letter the text of which says that he marries her and that they should stand witnesses to the fact that she gives herself in marriage to him, the marriage contract shall be taken to have been validly concluded, as the witnesses heard the words of the woman by her declaration of acceptance and the words of the man (proposal) by being read out or narrated to them by the said woman during the course of the same meeting.⁴⁵

Section 14 (i). Proposal and acceptance made both personally or through representative are valid, provided that the person or the representative making the proposal or acceptance be major and of sound mind.

(ii) If some unauthorised person without or in excess of his authority, makes proposal or gives acceptance of a marriage contract on behalf of his or her principal, such marriage contract shall remain in abeyance until the principal consents to it, otherwise it shall become null and void.

COMMENTARY

Proposal and acceptance made personally or through a representative both are valid, provided the representative be of sound mind and major. The books of *fiqh*, however, unanimously lay down that the representative at the marriage contract must be of sound mind while most of them state that it is not essential that the representative be himself a major. A prudent youth (a boy not having attained puberty who can distinguish good from bad and make distinction between gain and loss) may act as a representative at a marriage contract. This position is supported by the contention that a marriage is that class of contract from which, after its constitution, rights and obligations flow only to the principal on whose behalf the contract is made and do not accrue to the representative. Being so, it is not necessary that the representative be necessarily a major. Such contract differs from the other class of contracts from which rights and obligations accrue to the principal as well as to the representative and for which it becomes necessary that the representative be also a major⁴⁶. According to the Ḥanafīs, therefore, a minor youth who does possess the power of discretion and has the understanding of knowing good from bad and gain from loss may validly

⁴⁵Fatāwā ‘Ālamgiriyyah, op. cit. vol. ii, p. 2; Ibn al-‘Ābidīn op. cit., vol. ii, p. 272.

⁴⁶Al-Kāṣānī, op. cit. (*Kitāb al-Wikālat*) vol. vi, p. 33.

act as representative at a marriage contract⁴⁷. According to them, majority is no condition for validity of representation in marriage contracts.

According to Al-Shāfi'ī, however, making representative of a minor youth is not proper because he has no capacity of bearing responsibility⁴⁸. Calcutta High Court in the case of *Irfaanuddin vs. Baddah Shaikh*⁴⁹ held "the fact, that the person who acted as a 'vakil' on behalf of the girl was a minor, does not affect the validity of the marriage contract, because under section 184 of the Contract Act, 1872 a minor can act as an agent between the Principal and a third person".

In the view of the present writer, in the case of marriage through representatives, responsibilities of the representatives are much greater. Their function is to get those whom they represent contracted into marriage on the basis of their own words and statements. This is a function of great responsibility. It obviously entails that such a representative be a major person capable of acting with responsibility. Since a minor cannot act with responsibility on his own behalf in concluding contracts he is a *fortiori* incompetent to bind other persons as their representative in a contract. It thus appears to be reasonable and proper that it should be made an essential condition that the representative at marriage be majors. Herein, the author finds himself in agreement with the opinion of Al-Shāfi'ī.

Section 15. (1) Marriage contract may be effected with such

Words of proposal & acceptance

words of proposal and acceptance that may forthwith effectively and according to Shari'ah bind the parties to marriage contract in the relationship of husband and wife. The words, for instance, may be "I give my daughter in marriage to you".

(2) Proposal and acceptance, in unavoidable circumstances, may be made in writing or by such signs from which the parties may understand each other's purpose unequivocally.

COMMENTARY

According to the Ahnāf, marriage may be contracted by various words such as *Nikāḥ* (Marriage) *Tazwīj* (Taking one as wife), *Tamlīk* (ownership)

⁴⁷Al-Ḥaṣḥafī : *Durr al-Mukhtar*, on margin of *Radd al-Muhtar*, op. cit. vol. iv, p. 417 ; Dāmād Afandi, op. cit. vol. ii, *Kitab al-Wikalat*, p. 232 ; Mullah Miskin : *Fath al-Mu'in*, Cairo, vol. iii, p. 94-95 ; Fatāwā 'Ālam-giriyyah, *Kitāb al-Wikālat*, vol. iii, p. 254.

⁴⁸Al-Kāsānī, op. cit. vol. vi, *Kitab al-Wikalat*, p. 20.

⁴⁹51 Indian Cases, 583.

presence and hearing of two mature and prudent men or one man and two women, provided there be no legal disability in the person of any contracting party or parties of a nature that it may prove to be an impediment to the marriage contract.

Exception: If the parties to marriage contract are Shi'ah or the marriage contract is performed in accordance with Shi'ah rites, the presence of witnesses is not necessary for its validity.

COMMENTARY

The jurists have classified the conditions of a marriage contract as below :

1. Conditions for constituting a marriage contract
2. Conditions for the validity of the marriage contract
3. Conditions for completion of the marriage contract

The conditions for constituting a marriage contract have further been sub-divided into two categories:—

- (a) Conditions concerning the parties
- (b) Conditions concerning the marriage congregation or meeting

Conditions concerning the Parties:

The first condition concerning the parties to a valid marriage contract is being of sound mind with common sense. Prudence in marriage contract is a foremost condition. A mad or imprudent youth is not competent to contract marriage. The validity of marriage contracted by a prudent minor shall, however, depend on the permission of the guardian.⁵⁷

The second condition for constituting a valid marriage contract is the age of the parties. The competence of contracting the marriage of the parties depends upon their having attained the age of majority. If the contracting parties to a marriage contract or either of them be not major, the marriage contracted by them shall not be valid. The guardian, however, on behalf of the minor may propose or accept, as the case may be.⁵⁸

⁵⁷Fatāwā, 'Ālamgīriyyah, op. cit. vol. ii, p. 1.

”واما شروطه فمنها العقل و البلوغ و الحرية في التعاقد الا ان الاول شرط الاعتقاد فلا يتعقد نكاح المجنون والصبي لا يعقل والاخرين شرط اعتقاد فان نكاح الصبي العاقل يتوقف نفاذه على اجازة وليه“

⁵⁸See Chapter on “Guardianship of Marriage”, *infra*.

Age of puberty :

A girl is legally considered to be major when she begins to menstruate. The earliest time of a girl's menstruation is the age of nine. In case of her non-menstruation or in the absence of other evidence of her puberty, according to Imam Abū Ḥanīfah, the girls' age of majority is sixteen years. A boy is considered major when he starts getting night-pollution. The lowest age for night-pollution is twelve years. In the absence of evidence of night-pollution or of attaining majority, according to Abū Ḥanīfah, a youth will be considered major at the age of 18 years. Imām Abū Yūsuf and Imām Muḥammad Al-Shaybānī have differed from Imam Abū Ḥanīfah on this question. According to them, if a boy gets night-pollution or a girl begins to menstruate or both complete fifteen years of their age, they shall be considered major. Al-Shafi'ī also agrees with this view of Ṣahibayn (Abū Yūsuf & Muḥammad)⁵⁹. As for the Shi'ah view, Syed Amir 'Alī has written in his book "Mohammadan Law" that the majority of a youth will be presumed under law at the expiry of fifteen lunar years of his age, except when it be proved by evidence that he attained majority prior to this.⁶⁰ But the eminent Shi'ah jurist and *Mujtahid*, Al-Hillī has stated that the age of majority of a boy is 15 years while in the case of a girl, the age of puberty is nine years.⁶¹

Modern legislation relating to Marriageable Age :

Recent Legislation in various Muslim countries fixes the minimum marriageable age, as detailed below :

Turkey & Cyprus :

The Turkish Civil Code originally fixed the minimum marriage-age for boys and girls at the completion of eighteen and seventeen years respectively, with a provision that in exceptional cases the Court could, after hearing the parents or other guardians, permit the marriage of a boy or girl after the completion of the fifteen year of age. In 1938, an amending law reduced these limits. (Law No. 354 of 1938). Presently, men and women can marry at the completion of seventeenth and fifteenth year of age respectively, and in exceptional cases the court may, after hearing the guardians, permit the marriage of a boy of fifteen or a girl of fourteen years of age. (The Turkish Civil Code, 1926, Article 88).

⁵⁹Al-Kāsānī, op. cit. vol. vii, p. 172 :

عن سيدنا عمر عرض على رسول الله غلام و هو ابن اربع عشرة سنة فرده و عرض
هو ابن خمس عشرة فاجازه فقد جعل عليه السلام خمس عشرة حداً للبلوغ -

Al-Marghīnānī : *Al-Hidayah*, Karachi, vol. ii, *Kitāb al-Nikōh*.

⁶⁰Amīr 'Alī, Syed : *Mohammadan Law*, Lahore, vol. ii, 1965, p. 246.

⁶¹Al-Hillī, *Sharai' al-Islam*, Beirut, Vol. ii, p. 204.

In Cyprus, under the Turkish Family (Marriage and Divorce) Law, 1951, men and women can marry normally on the completion of eighteenth and seventeenth year of age respectively, provided that if a girl is below the age of eighteen years, her guardian's consent shall be necessary. (The Turkish Family Law of Cyprus, 1951, Section 6(1). A boy of fifteen and a girl of fourteen years may, however, be permitted by the Court to marry in exceptional cases and for good reasons. (Section 6 (1) proviso 2).

Egypt :

At the time of marriage, man and woman must have completed their eighteenth and sixteenth year of age respectively. A marriage in violation of this rule, although not invalid *per se*, will not be registered. (Law No. 56 of 1923). Such a marriage will not also be recognised by the Court for the purpose of granting any relief, except in a claim relating to legitimacy of issues. (Egyptian Civil Code, 1931, article 99).

Jordan :

In Jordan the minimum marriage-age is eighteen years for men and seventeen years for women; a boy who has completed his fifteenth year can marry with the permission of the Qāḍī; and such a girl can do so with her guardian's consent. Where a girl, after having completed seventeenth year of her age, desires to marry a person who is her 'equal' but her guardian unreasonably withholds his consent to the marriage, the Qāḍī can dispense with the requirement as to his permission. If the difference in age between the parties to an intended marriage is more than twenty years, permission of the Qāḍī or his deputy shall be required for the solemnization of the marriage. The Qāḍī shall give such permission if he is satisfied that the party younger in age has consented to the marriage without any compulsion or duress and that the marriage is not against the interest of such party. If the consent of the younger party has been obtained by compulsion or duress, the marriage shall be fāsid (irregular) under article 18. (Articles 4-6).

Syria :

In Syrian Family Law it is provided that the normal age of marriage is eighteen years for men and seventeen years for women. A man of fifteen and woman of thirteen years can, however, be permitted by the Court to marry, if he or she has attained puberty and the father or the grandfather, if living, has given his consent. In the case of disparity of age between the parties to a marriage, the Court can prohibit it unless it involves any benefit. (Articles 18, 19).

Tunisia :

Men and women in Tunisia can freely marry on the completion of twenty years of age. The Court may also authorise the marriage of a boy

below the age of twenty or a girl below the age of seventeen years, if there are grave reasons for that. (Article 5 as amended by Law No. 1 of 1964). A girl who has completed her seventeenth year may, however, validly marry with the permission of her guardian, and if such a girl wishes to marry but her guardian does not permit her to do so, the case shall be decided by the Court. (Article 6).

Morocco :

A male is competent under the Moroccan law to marry on the completion of eighteen years and a female on that of fifteen years of age. However, if a person who desires to marry is below the age of legal majority, his or her freedom is curtailed by the requirement that the marriage-guardian must give consent to the proposed marriage. (The Code of Personal Status, 1958, Articles 8-9).

Iraq :

Normally the minimum age for marriage is provided eighteen years for both men and women. (Article 8). In special cases, however, the Court can permit a person to marry after the completion of sixteen years of age if such person has attained puberty, is medically fit for marriage and has obtained the guardian's consent ; if a guardian unreasonably withholds his consent, the Court may dispense with the requirement of the guardian's consent. (Article 9).

The Court may permit an insane person to marry if it is satisfied that the proposed marriage is not prejudicial to public interest, that some personal benefit is involved in it, and that the other party thereto has freely agreed to the proposed marriage. (Article 7 (2)).

Iran :

The minimum marriage-age as laid down in the Iranian Civil Code is eighteen years for man and fifteen years for woman. (Article 1041). Marrying a person who is below this age is an offence punishable under the Marriage Law of 1931. (Article 2).

Indonesia :

The Regulations issued in 1947 direct the marriage officials to discourage the practice of child-marriage. Under these Regulations, it is the liability of these officials to prevent, as far as possible, a child-marriage from taking place and being registered.

Ceylon :

At the time of the registration of a marriage under the Act of 1951, the female party thereto must have attained the age of twelve years. If this requirement is not fulfilled, the marriage shall not be registered unless its

registration is authorised by the Qāḍī of the area in which the minor bride resides. (Section 23).

Pakistan :

In Pakistan, according to Section 3 of the Pakistan Majority Act, 1875, 18 years is the age for attaining majority. The minors, whose guardians have been appointed through court or who are under the care of the Court of Wards are considered to have attained majority at the expiry of 21 years of their age. But the said law by virtue of its section 2 does not apply to the matters of Muslim Personal Law relating to Marriage and Divorce. Under the Muslim Family Laws Ordinance VIII of 1961, however, the minimum age-limit for the marriage contracting parties has been fixed in case of female at 16 years and in the case of a male at 18 years. This has been done with a view of remedying the social evils created by child marriages.

The question of the fixation of the minimum marriageable age largely depends on the climate of the countries, health standards, social environment and economic conditions.

Analysis :

In Egypt, the law provided that a marriage where the bridegroom was below the age of eighteen or the bride below the age of sixteen could not be registered and therefore could not, if disputed, be the subject of judicial relief. By contrast with this approach, legislation concerning the marriageable age in other Middle-Eastern countries has directly affected the validity of marriage. Full competence to marry is acquired, not with the advent of puberty as under traditional *Shari'ah* law, but on attaining a specified age. This age is almost everywhere eighteen for males, and for females varies between eighteen (Iraq), seventeen (Syria and Jordan) fifteen (Morocco) and twenty (Tunisia). Marriage below these ages, however, is permissible on proof of sexual maturity. Generally the Middle-Eastern codes specify ages below which no claim of sexual maturity will be entertained and which, therefore, represent the minimum ages for marriage. The lower limit of puberty laid down in this regard by traditional *Shari'ah* Law.....the age of nine for girls and twelve for boys.....has been raised in Syria, for example, to fifteen for males and thirteen for females; in Jordan to fifteen for both sexes, and in Iraq to sixteen for both sexes. Young persons who have reached these ages, but not yet the age of full competence to marry, may marry subject in most cases to the consent of the marriage guardian and in all cases to the permission of the court.

Failure to obtain the necessary permission will, of course, preclude registration of the marriage and may render the parties liable to statutory penalties, but it will not invalidate the marriage. It is clear, that modern

legislation relating to marriageable age has almost completely abolished the right of the marriage guardian to contract a valid marriage by constraint, or *ijbār*. In the Middle East generally no legal recognition is any longer afforded to the marriage of a minor who is not physically mature.

In India and Pakistan a guardian may still validly contract his minor ward in marriage by *ijbār*, notwithstanding the punitive sanctions attached to the marriage of minors (boys below eighteen and girls below sixteen) by the Indian Child Marriage Restraint Act, 1929 (as amended by the Pakistan Muslim Family Laws Ordinance, 1961). However, a girl so contracted in marriage during minority may repudiate the marriage, even if it was contracted by her father or paternal grandfather. Under the terms of the Pakistan Ordinance she may do this by satisfying the court that she was contracted in marriage by her father or other guardian before she was eighteen, and that the marriage had not been consummated. (For details see Chapter on *khayār al-Bulūgh* (The Option of Puberty).

Consent of Parties :

The second condition for constituting a marriage contract is the consent of the parties to the marriage contract. Marriage contract without the consent of parties is not valid.⁶² The consent of a woman is necessary, whether she be a major virgin or with coverture experience. Her guardian, according to the Ḥanafīs, cannot compel her to enter into a marriage contract.⁶³ According to them, therefore, the marriage contract of a major woman (virgin or *Feme Covert*, divorced or widowed)⁶³ without her consent or against her will, though made at the instance of her father or grandfather, cannot take effect. According to Shafī'īs, in a marriage got contracted of a virgin by her father or grandfather, her consent is not necessary.⁶⁴ According to them, if the virgin is got contracted in marriage by any person other than her father or grandfather her consent in clear terms is necessary.⁶⁵

The reason for this distinction, according to *Shafī'īs*, is that a father or grand-father alone can act as guardian at marriage contract; besides them no

⁶²Al-Sarakhsī, op. cit. vol. 5, p. 2 :

وفى الحديث المعروف البكر تستامر فى نفسها ومكوتها رضاها فدل ان اهل الرضا منها معتبر-

Muhammad Zaman Vs. Naima Sultan, P L D 1952, Peshawar, 47.

⁶³Qāḍī Khan : *Fatāwā*, p. 157 :

رضاء المرأة اذا كانت بالغة بكرة كانت او ثيباً فلا يملك الولي اجبارها على النكاح-

Ḥaṣkafī : op. cit. p. 206 :

- ولا تجبر البالغة البكر على النكاح لانقطاع الولاية بالبلوغ

Lisān al-Hukkām, Cairo, p. 153.

one else is entitled to do so. This point of view of *Shāfi'is* appears to be unsound. The consent of a major virgin in her own marriage contract must be essential as already discussed in detail under Section 10 *supra*.

Implied Consent :

The consent may be both express or implied. Mere smiling, laughing, maintaining silence or weeping silently by a virgin is construed as her implied consent.⁶⁶ If the laughter is contemptuous or mere buffoonery, as usual among the people, it shall not be construed as her implied consent.⁶⁷ The implied consent constitutes the substitute of express permission or consent only when a nearer guardian solicits from her the consent to her marriage contract. If a remote guardian or a stranger solicits the consent of a major virgin, as that of a consummated woman, her express consent is essential.⁶⁸

Muslim jurists recognise the application of the principle of implied consent only in the case of a contract of marriage of a virgin. In the case of a consummated woman (i.e., one who is separated from her husband by divorce or on his death) her express consent is essential.⁶⁹ If the hymen of a woman is destroyed on account of physical exertion, menses, wounds or advanced age, even then according to all the Hanafi jurists, her implied consent to marriage contract would be enough⁷⁰ (she being in reality a virgin). According to Al-Shāfi'ī, however, in matters of consent of such woman to her marriage contract the rules with respect to a widow or divorce shall be applicable. The reason for this disagreement between the jurists being that Imām Shāfi'ī accepts only the literal meaning

⁶⁴Al-Sarakhsī, op. cit. vol. v, p. 2.

والشافعي رحمه الله تعالى لا يعمل بهذا الحديث أصلاً (البكر تستاء من في نفسها وسكوتها رضاها) فإنه يقول في حق الأب والجد لا يشترط رضاها -

⁶⁵Ibid;

Ibn al-Rushd : *Bidayatul Mujtahid*, vol. ii, p. 5.

وفي تزويج غير الأب والجد لا يكفي بسكوتها -

⁶⁶Al-Sarakhsī : op. cit., vol. v, p. 4 ; Al-Qudūrī, op. cit. page 149 ; Al-Haskafī : op. cit. vol. ii p. 207.

⁶⁷Al-Sarakhsī, op. cit. vol. v p. 4.

وكذلك قالوا ان ضحك كالمستهزأة لم سمعت لا يكون رضا والضحك الذي يكون بطريق الاستهزاء معروف بين الناس

⁶⁸Al-Haskafī, op. cit. vol. ii p. 209 ; Al-Sarakhsī, op. cit. vol. v p. 4 ; Al-Marghīnānī : op. cit. Kitāb-al-Nikāh, vol. ii p. 315.

⁶⁹Al-Qudūrī : op. cit. page 149;

⁷⁰Al-Qudūrī, op. cit. p. 149; Al-Haskafī, op. cit. vol. ii page 210.

of the words 'Consummated' and 'Virgin', whereas Imām Abū Ḥanīfah prefers the legal and juristic meaning of these terms. In other words, Al-Shāfi'ī attributes the principles of silence and implied consent to virgin on the ground of signs of maidenhood, whereas Abū Ḥanīfah ascribes the principles of implied consent to virgin on the ground of modesty and bashfulness. Social mores dictate that Abū Ḥanīfah's view is obviously more reasonable.

Consent under Compulsion or Misrepresentation :

The consent must be obtained without coercion or compulsion. Coercion or deception in obtaining consent shall vitiate the marriage contract and it shall be deemed to be *fāsid* (irregular) till it is ratified afterwards.⁷¹ If a man, therefore, by misrepresentation makes a woman believe that he comes from a certain lineage to which actually he does not belong, and obtains consent from that woman to marry him, the woman has a right to get the marriage dissolved. If the man be of more respectable lineage than what he represented to be, the woman shall not have the right to get the marriage dissolved.⁷² The position of a woman in such a situation is otherwise; if a woman misrepresents her lineage the marriage contract shall remain binding upon the man and he shall not have the right, on this ground, to get the marriage dissolved, because in the matter of social standing in marriage the status of woman is of no consequence. The man may, however, divorce her.⁷³ In such a case, if the divorce takes place before the consummation, no dower would be due on the man and no term of waiting i.e. period of '*iddat*' would be necessary for the woman. In case the marriage has been consummated, payment of proper dower or specified dower, whichever be less, shall become incumbent upon the man as will the observance of '*iddat*' by the woman. The payment of maintenance during '*iddat*' shall also become incumbent upon the man. The right of separation, in such cases, is based on the principle of 'option for defect in a contract of sale'. The direction, for the payment of dower after consummation, has been given on the basis of conjugal rights exercised in consummation and the direction for the observation of the waiting period ('*iddat*') by the woman is meant for the determination whether she is bearing his child.

Indo-Pak View :

Under Muhammadan Law, the regular procedure for obtaining the consent of the girl must be proved and in the absence of the proof that the

⁷¹*Abdul Latif v. Niaz Ahmad*, (1909) Indian Law Reporter 31 All. 343; *Kulsum Bi v. Abdul Qadir*, Indian Law Reporter, (1921) 45 Bom. 151.

⁷²*Al-Sarakhsī*, op. cit. Volume V Chapter on *al-Ifkā* page 29.

⁷³*Ibid*, page 30. Also see page 97, where different other examples of misrepresentation such as to represent virgin while being in fact *ṭhayyibah* or to represent beautiful while in fact being ugly have been discussed.

procedure was gone through, no valid marriage can be taken to have been established. There should be some evidence to show that the girl agreed either expressly or by implication. The Vakil is a very important witness in the matter of proof of consent. Where a Muhammadan girl brings a suit in which she has definitely asserted that she had not consented to the marriage and it was against her wishes and in support of this allegation she has produced witnesses, who are related to her and who say that although a nominal nikāḥ was gone through, she definitely stated to them that she had not agreed to the marriage, the onus shifts to the defendant to prove that the nikāḥ was properly performed. (AIR 1942 Pesh. 19; 1942 Pesh. L. Jour. 19 : 199 Ind Cas 531).

Under the Muhammadan Law, marriage is a contract, and even among the Shafi'ī sect of Surnis, the marriage of an adult virgin is invalid if it is performed without her consent and against her wish. (AIR 1939 Bom. 489 : 41 Bom LR 1020 : 185 Ind Cas 390. Where the girl has become adult at the time of the nikāḥ, the consent of her father could not take the place of her own consent which under the Shī'ah law is essential for validity of the marriage. (AIR 1929 All 18 : 26 ALJ 705 : 50 All 733 : 133 Ind Cas 434 (DB). The consent of an adult virgin even among the Shafi'ī sect is essential for the validity of a marriage and the only difference between Ḥanafī Law and the Shafi'ī Law on this point is that under the Shafi'ī Law the consent must be expressed through a *valī* and not direct. (AIR 1928 Mad 1285 : 52 Mad 39 : 28 MLW 710 : 55 MLJ 828 : 133 Ind Cas 306 (DB).

Where a Shafi'ī girl was clandestinely married to a Ḥanafī boy without the consent of the girl's father and the Mulla was made to believe that the girl had become a convert to the Ḥanafī sect, the usual presumption as to the validity of a marriage could not be made and it was invalid for want of consent of the girl's father. Under Shafi'ī Law, a woman who under any circumstances had connection with a man became "*ṭhayyibah*". AIR 1914 Low Bur 213 : 8 LBR 54 : 29 Ind Cas 866.

Fraud in Marriage : When consent to a marriage is obtained by fraud or force, such marriage is invalid unless ratified and the husband is not liable to pay the dower of the deceased wife to her heirs. Where a Muhammadan woman at the time of her marriage was suffering from illness, which prevented consummation and subsequently resulted in her death, and the fact of her illness was concealed from her husband, his consent to the marriage is said to have been obtained by fraud. (1909) 6 ALJ 423 : 31 All 343 (345), 346) : 1 Ind Cas 538 (DB).

Essentials of Validity : Marriage under Muhammadan Law is a civil contract and to make it valid the free consent of the contracting parties is

essential. A Muhammadan woman after attaining age of puberty becomes a *sui juris*, able to look after her interests herself and if she does not consent to a marriage of her free will and the consent is obtained by coercion or undue influence, such marriage will not bind her. The mere fact that she kept silent for two years after the marriage unaccompanied by any overt act indicating recognition of it, does not amount to an acquiescence so as to preclude her from obtaining the marriage declared invalid. [73 PR 1909 : 114 FWR 1909 : 118 PLR 1909 : 2 Ind Cas 814 (DB)].

Modern Legislation relating to Consent :

The relevant provisions relating to consent of the parties to marriage in the legislative enactments of several Muslim countries are given below:—

Sudan :

Art. 6. (a) The consent and approval of a girl who has attained puberty is essential for the choice of her husband as well as for the amount of dower.

(b) As to puberty, the statement of the girl shall ordinarily be accepted, unless it is contrary to clear indications.

(c) Silence of a virgin as to the choice of the husband and the amount of dower shall amount to her consent ; and her assertion that she did not know that silence would mean consent shall not be accepted, unless she is mentally too weak.

(d) If a girl signifies her refusal expressly or impliedly, the marriage, if concluded, shall be void.

(e) In case of a girl's second marriage silence will not suffice; her express consent as to the husband and the dower shall be necessary.

Art. 7. Where a virgin girl who is adult is contracted into marriage by her guardian without her consent, she must, on being informed of the marriage, make an express statement giving her consent. Failing such a statement, the marriage shall be ineffective.

Syria :

Art. 5. A marriage shall take place through offer by one party and acceptance by the other party to the contract.

Art. 6. Offer and acceptance shall take place through words which literally or customarily constitute a marriage.

Art. 7. The offer or acceptance may be made through a letter if either of the parties is absent from the place of marriage.

Art. 10. If a person is unable to speak, offer or acceptance can be made in writing or, if he or she is illiterate, by known signs.

Art. 12. The marriage must be contracted in the presence of two men or one man and two women who are Muslim, sane and major and hear the offer and acceptance and understand their implications.

Art. 13. A marriage cannot be suspended to a future time or made conditional with an uncertain event.

Art. 15. (1) Sanity and puberty are essential for capacity to marry.

(2) The Qāḍī may permit the marriage of an insane or an imbecile if doctors certify that marriage shall be helpful in his treatment.

Art. 16. A male shall attain capacity to marry on the completion of eighteen years and a female on that of seventeen years of age.

Art. 17. The Qāḍī can refuse to a married man permission to marry another woman if it is proved that he is not able to maintain two wives.

Art. 18. (1) If an adolescent boy who has attained fifteen years of age or an adolescent girl who has attained thirteen years of age, claims to have attained puberty and wants to marry, the Qāḍī may give permission to do so on the proof of the claim and of their physical maturity.

(2) If the father or the grandfather is the guardian of such person, the guardian's consent shall be necessary.

Art. 19. Where there is disparity of age between the parties to a marriage and no benefit is involved in it, approval of the Qāḍī for the marriage must be obtained.

Tunisia :

Consent of the guardian is essential for the marriage of an insane ; if the marriage of such a person is solemnized without the guardian's consent, the latter can apply for its cancellation by the Court before it is consummated.

Art. 3. No marriage shall be concluded without the consent of both spouses. It is essential for the validity of a marriage that two eligible witnesses be present and the dower be specified.

Art. 4. No marriage shall be proved except by a formal deed as prescribed by law. A marriage concluded in a foreign country shall be proved in accordance with the law of that country.

Art. 5. Both the parties to marriage should have attained the age of puberty and should be free of all legal impediments. A woman shall attain the age of puberty on the completion of seventeen years and a man on that of twenty years. Marriage of a person below such age will depend on the special permission of the Court, which shall be granted only for important reasons.

Art. 6. Marriage of a person who has not attained the legal age of majority shall be subject to the consent of the guardian. If the guardian refuses to give consent to a marriage which a person persistently desires, the matter shall be referred to the Court.

Art. 7. Marriage of a person interdicted due to prodigality shall not be valid unless consented to by the guardian ; the guardian may demand, before consummation, cancellation of such a marriage by the Court.

Art. 8. The guardian shall be an agnative relative, sane, male and major. The father or his executor is the primary guardian of a minor child, male or female ; in the absence of a guardian, the Court shall act as guardian.

Art. 9. A marriage may be concluded by the spouses themselves or by their agents ; the guardian may also delegate his authority.

Art. 10. No special qualifications are necessary for an agent ; he shall not delegate his authority without the principal's consent. Delegation of authority must be made by an express deed mentioning the identity of both spouses, lest it should be void.

Morocco :

Art. 4. (1) A marriage shall be solemnized by offer by one party and acceptance by the other party through the words which expressly or by custom effect a marriage.

(2) An offer or an acceptance expressed in writing or by sign is valid where the person doing so is unable to speak.

Art. 5. It is essential for the validity of a marriage that two trustworthy witnesses or notaries should hear the offer and acceptance on one and the same occasion made by the bridegroom and the bride's guardian, after she has given her consent and authorisation to the guardian.

The Qādī may, in exceptional cases, hear a claim as to the existence of marriage and may admit legal evidence in proof thereof.

Art. 6. The spouses must be sane, have attained puberty and be free from all disqualifications under the Sharī'ah.

Art. 7. The Qādī may authorise the marriage of an insane or an imbecile if it is established by advice of experts in mental diseases that the marriage will be beneficial for the cure, provided that the other spouse has been informed of it and has consented thereto.

Art. 8. A man is competent to marry on the completion of the eighteenth year of age, and if there is any doubt as to his physical fitness, the Qādī shall decide the matter; a woman is competent to marry on the completion of the fifteenth year of her age.

Art. 9. Where a party to marriage is below the legal age of majority the consent of the guardian shall be a further condition; and if the guardian

withholds his consent the Qāḍī shall decide the matter if the girl insists on marriage.

Algeria :

The Marriage Ordinance, 1959 of Algeria provides that express consent of the bridegroom and the bride exchanged in words in the presence of two competent witness shall be essential for the solemnization of a marriage. Want of free consent of either party would invalidate the marriage. Where a party is minor or interdicted, approval of the marriage by the guardian of such party shall also be necessary. The consent of parties should be explicit and unequivocal and should not be dependent on the happening or non-happening of a future uncertain event. Further, misrepresentation or compulsion shall invalidate the marriage consent. It is an offence to obtain by inducement the consent of a person for his or her marriage. (Articles 2-5).

Malaysia, Brunei and Singapore :

A marriage shall be void in some States of Malaysia unless both the parties thereto have given their express consent ; whereas in the other States consent of the bride's guardian takes the place of that of the bride herself. The guardian's consent is essential in all the States of Malaysia for the validity of a girl's marriage, but if there is no guardian or if he unreasonably withholds his consent, the Court may permit another person to act as the guardian.

In Brunei, under the Enactment of 1955, a marriage shall be void unless both the parties have agreed to it and the bride's guardian or, in special cases, the Court has given consent to the proposed marriage.

In Singapore, the Muslims Ordinance, 1957 authorises the kāthī (probably, a term used for Qāḍī) to solemnize the marriage of a girl who has no guardian or whose guardian refuses his consent on unsatisfactory grounds, provided that there is no obstacle under the law of Islam to the proposed marriage.

The Act incorporates the requirement of the Shafi'ī law relating to guardian's consent to the marriage of a girl. It provides that if a girl belongs to the Shafi'ī school of Islamic law, her marriage shall not be valid unless her guardian (wali) is present at the time of marriage and communicates his consent to, and approval of, the marriage. (Section 25). Only a person entitled under Islamic law to act as a guardian can do so; if a person not so authorised has acted as the guardian, the marriage shall not be registered under the Act. (Section 26). Where a guardian unreasonably withholds his consent to the marriage desired by a girl, or where a woman has no guardian, the Qāḍī, may, on her application, make an order dispensing with the requirement of guardian's consent. [Section 47 (2) & (3)].

Conditions relating to Congregation of Marriage :

So far as the congregation of marriage is concerned, two conditions have to be fulfilled. The one relates to the place of marriage contract, while the other concerns the presence of witnesses in the marriage congregation.

Congregation means the meeting held for the purpose of concluding a marriage contract. It is essential for the proposal and acceptance that both be made in the same sitting. If the proposal is made in one sitting and the acceptance is made in another, the marriage will not be considered as duly contracted.⁷⁴ If in the congregation after a proposal is made, (for instance, both parties are in the same congregation ; one of them makes the proposal but the other before accepting even stands up or gets engaged in some other business, this constitutes a change in the sitting) acceptance be conveyed in another sitting, it will not make the marriage duly contracted.⁷⁵ Al-Kāsanī, a great *Ḥanafī* jurist, holding the single continuous character of the congregation to be a condition for marriage, has written that "The parties to a marriage contract when present in congregation of marriage, it is necessary for the purpose of the continuity of the sitting, that the proposal and acceptance be made in that one sitting otherwise the marriage contract shall not take effect."⁷⁶

It is, perhaps, necessary here to answer the question as to how, in the event of proposal made through a messenger, the condition of the congregation being one is fulfilled ? For instance, the woman is in Karachi and the man is in Lahore. The man from Lahore informs her through a letter or a messenger that he contracts marriage with her. How, in this instance, can it possibly be said that the proposal and acceptance have been made in one marriage congregation ? The answer is that the woman, having received the letter or the messenger, narrates in presence of two witnesses that such and such person has written her a letter or has sent a messenger to her to the effect that he contracts his marriage with her and she accepts the proposal of marriage. The contract of marriage shall thus be considered as having been validly concluded, (the proposal having been disclosed and acceptance averred in the same sitting).

Likewise the marriage contract may be constituted by producing and reading the authentic writing of the proposal before witnesses in a marriage congregation, and on its acceptance by the other party, provided at the time of acceptance, the proposal, too, is stated in the presence of the wit-

⁷⁴Fatāwā 'Ālamgiriyyah, op. cit. Kanpur. Vol. ii p. 2.

⁷⁵Ibid.

Ibn al-Ābidīn : op. cit. Vol. ii p. 273.

⁷⁶Al-Kāsanī : op. cit. Vol. ii p. 232 (*Kitāb al-Nikāḥ*).

nesses. Because by reproducing the proposal in the aforesaid manner, at the time of acceptance, the marriage sitting, in its intent, will be considered to be a single one.

In view of the present day improved facilities of communication, the proposal and acceptance of marriage contract may even be made on the telephone, provided the two witnesses hear both of these at one and the same time with the two parties and distinctly recognize their voices. On analogy the same may be arranged through television, and the same legal position will hold.

Presence of witnesses at the Marriage Congregation :

The second requisite of the marriage congregation is the presence of witnesses and hearing of the proposal and acceptance of the marriage contract by them at the marriage meeting or gathering. There are three aspects of the same : first the presence of the witnesses, second the number of witnesses, and the third the eligibility or competency of the witnesses to hear evidence of the proposal and acceptance made.

Marriage Without Witnesses :

Opinions differ on the validity of a marriage contracted in the absence of witnesses. The *Ḥanafīs*, the *Shāfi'īs* and the *Ḥanbalīs* consider the presence of witnesses as an essential condition of a valid marriage. Imām Mālik, however, is of the view that the presence of witnesses, at the time of nikāḥ, is not an essential condition of its validity, provided the marriage is duly publicised. According to Shi'ah, the presence or absence of witnesses in a marriage is quite immaterial.

Hanafi View :

A famous Ḥanafī Jurist, Burhān al-Dīn Al-Marghīnānī (d. 593 A.H.) in his most authentic book "Al-Hidāyah" has stated, "Marriage between two Muslims cannot be contracted, except in the presence of two witnesses, both of them should be free, sane, adult, Muslim men or one Muslim man and two Muslim women, *ādil* (i.e. of an established integrity of character), or *ghayr 'ādil* (i.e. without an established integrity of character), or (even if) both of them have suffered punishment for slander".

The author has, further observed, "Know that evidence is an essential condition in the matter of (i.e. for the validity of) nikāḥ. The Prophet says, "There is no nikāḥ without witnesses," and this (saying of the Prophet) is an argument against (the opinion of) Mālik who considers the condition to be publicity without witnesses"⁷⁷.

⁷⁷Al-Hidayah, Qur'ān Maḥal Karachi, Vol. ii p. 306 :

“ان الشهادة شرطاً في باب النكاح”

Similarly, Fakhr al-Dīn, Qādī of Damascus, commonly known as Qādī Khan (d. 592 A.H.) in his book *Fatāwā Qādī Khān* writes, "Evidence, according to Ḥanafīs, is one of the conditions for the validity of nikāḥ."⁷⁸

Another great Ḥanafī jurist, 'Ala' al-Dīn Al-Kāsānī (d. 587 A.H.) in his famous book, "*Bada'i' al-Ṣanai'*" holding the presence of witnesses to be the condition of a valid Nikāḥ has stated that the marriage is not constituted in the presence of lunatics and children. He maintains, "The evidence is one of the constituent elements of 'aqd (contract). The elements of 'aqd are proposal and acceptance, without acceptance, therefore, 'aqd shall not be constituted. As in the absence of an element (acceptance) marriage does not come into existence so also in the absence of evidence of acceptance (i.e. presence of witnesses) this important constituent cannot be supposed to have come into existence"⁷⁹.

The above extracts from the authentic books of eminent Ḥanafī jurists reveal that, according to Ḥanafī school of *fiqh*, the presence of witnesses, at the time of nikāḥ, is a condition for the validity of the two constituents of nikāḥ i.e. proposal and acceptance. In the opinion of these jurists the presence and hearing of the witnesses at the time of nikāḥ, unlike other contracts, is not for the proof of marriage alone but is for the validity of the contract of marriage itself.

It is because of this principle that the Ḥanafīs, Shafi'īs and Hanbalis consider the presence and hearing of witnesses at the time of nikāḥ to be the condition for the validity of the marriage. Imam Mālik, on the other hand, does not consider the presence of witnesses, at the time of the proposal and acceptance of the nikāḥ, to be a condition for its validity. According to him, it is its publicity which is essential. That is why, according to him, if the marriage is performed in the absence of witnesses but is announced or published (i.e. publicly known), it is quite valid.

Imam Malik's View :

According to Imām Mālik the presence of witnesses at the time of marriage is not necessary. He maintains that it is the publicity which is the condition for the validity of Nikāḥ, in as much as a woman, if marries in presence of witnesses with a condition that the marriage contract shall be

⁷⁸Fatawa Qādī Khan, op. cit. Delhi, p. 155.

فصل في شرائط النكاح ، منها الشهادة عندنا “

⁷⁹Al-Kāsānī, op. cit. Vol. ii p. 253.

” ولا ينعقد النكاح حضرة المجانين والصبيان لان الشهادة من شرائط ركن العقد وركنه وهرالا يجاب والقبول ولا وجود للركن بدون القبول فكما لا وود للركن بدون القبول حقيقة لا وجود له شرعاً بدون الشهادة “

kept secret, it shall be unlawful, and if the woman marries without witnesses with the condition that the marriage shall be given publicity, it shall be lawful.

Imam Malik's view is based on two traditions of the Prophet. The first being that the Prophet has prohibited the contracting of *nikāḥ* in secret⁸⁰ and the second is that he said "Announce the marriage, no matter if it is by means of a tambourine"⁸¹. Mālik construes the first *ḥadīth* in the sense that the Holy Prophet by prohibiting the contracting of secret marriage has commanded its publicity. Mālik's interpretation of the said *ḥadīth* is based on a rule of logic that the act which is forbidden has in itself an implication to do a thing contrary to that prohibition. Mālik, therefore, considers the publicity an essential condition of the validity of marriage and has adopted the beating of drum as a means to it. In fact, Mālik seeks to distinguish marriage from adultery, as adultery is secret.

Courts' View :

Publicity would be desirable for the marriage and a public proclamation by means of beating of drum may even be preferable, but it does not seem to follow that if no drums are beaten or "public" proclamation is made, the marriage would become void. According to the various text books on Muslim Law, even the absence of witnesses at the *nikāḥ* would merely make the marriage irregular and not void. A marriage duly performed in the presence of two persons could not be described as invalid in any sense. (Shahzada Begum v. Abdul Hamid : PLD 1950 Lah. 504, S.A. Rahman, J.).

Hanafi's Arguments :

The *Hanafīs* on the other hand rely on the following two *ahādīth*;

(1) There is no *nikāḥ* without witnesses⁸² and (2) that adulteress is the woman who gives herself in marriage without evidence.⁸³ According to them, if evidence were not a condition for the validity of *nikāḥ* the woman, who married without witnesses, could not have been described as adulteress. It is, however, correct that the purpose of evidence is to distinguish a marriage contract from adultery. As far as the announcement is concerned, the presence of witnesses at the time of marriage fulfils this object. This can be the true interpretation of the traditions of the Holy Prophet, which have

⁸⁰Al-Kāṣānī, op. cit. Vol. ii p. 252-53:

”انه نهى عن نكاح السر“

⁸¹Ibid :

”اعلنوا النكاح ولو بالدف“

⁸²لا نكاح الا بالشهود

⁸³الزانية التى تنكح نفسها بغير بينة

been relied upon by Mālik. The presence of witnesses at a marriage will ensure, as a matter of fact, that the marriage is not a secret one.

The question however, arises whether the condition is for the completion of the marriage contract or is for its validity. If it is a condition for the completion of the marriage contract, the *Nikāḥ* would be irregular (*fāsid*) under law, till the condition of the presence of the witnesses is not fulfilled before the consummation of marriage. If it is a condition for the validity of marriage contract the marriage shall be validly constituted only by the presence and hearing of witnesses at the time of the proposal and acceptance in the marriage congregation. The discussion leads to the question whether the evidence in the marriage is imperative under the *Shari'ah* or it is simply required for the sake of providing proof, in case of denial of marriage contract by either party. The jurists who consider marriage as a religious mandate stress upon the imperativeness of the presence of witnesses at the time of proposal and acceptance. Some jurists, however, consider the presence of witnesses necessary for the purpose of completing the marriage contract and rebutting its denial from any one.

Pakistan View :

Justice S. A. Rahman, Judge of the Lahore High Court (as he then was) in the case of *Shahzad Begum Vs. Abdul Hamid* rightly observed," All that one can say, therefore, is that publicity would be desirable for the marriage and a public proclamation by means of a beating of drums may even be preferable but it does not seem to follow that if no drums are beaten or 'public' proclamation is made, the marriage would become void."⁸⁴ A marriage duly performed in the presence of two persons could not be described as invalid in any sense, even if no other person except the couple and two witnesses know of that marriage or no public proclamation is made. The marriage in such cases shall be valid.

Modern Legislation relating to presence of witnesses :

In Qadrī Pasah's Code⁸⁵ and Syrian Law of marriage the condition of the presence of witnesses at the time of proposal and acceptance has been incorporated as mandatory for giving validity to the marriage contract,^{85a} and this apparently is the correct view, as in vogue almost in the entire Muslim world.

⁸⁴ *Shehzad Begum v. Abdul Hamid*, PLD 1950 Lah. 504.

⁸⁵ Qadrī Pasha: op. cit. sec. 7.

^{85a} Qanūn Al-Aḥwāl al-Shakhsiyyah, Syria, sec. 12 :

” يشترط في صحة عقد الزواج حضور شاهدين رجلين و امرأتين مسلمين عاقلين بالغين ساعين بالإيجاب والقبول فاهمين المقصود بها “

Conclusion :

From the above discussion it is evident that according to *Sunnī* law the presence of witnesses at the time and place of marriage contract is a condition of marriage.

The *Sunnī*s doctrine regarding the presence of witnesses at the time of marriage thus appears to be sound. A marriage brings an important change in the status of the parties which should not be jeopardised in any manner. The presence of witnesses at the time of marriage is all the more necessary to discourage immorality for, in the absence of such condition, it may always be open to a man and woman charged with adultery to plead that they were secretly married and so escape the consequence of their immoral conduct. The *Shī'ī* view in this respect needs moderation.

Number of witnesses :

The next pertinent question is regarding the requisite number of witnesses for the marriage contract. The Holy Qur'ān lays down a rule while it says: "O Ye who believe! When you deal with each other, in transactions involving future obligations, in a fixed period of time, reduce them to writing. And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her."⁸⁶ This verse has been revealed admittedly in connection with financial transactions and contracts to be completed or performed in future and contains directives regarding witnesses. The jurists, in general, have derived from this verse the requisite number of witnesses at a contract of marriage. Al-Shafi'ī, however, insists on the evidence of males for marriage contracts.⁸⁷

Hanafi View :

According to *Hanafi* School of *fiqh*, the presence of two males or one male and two female witnesses and their hearing of the proposal and acceptance at the time of marriage is essential.⁸⁸ It is also necessary that the witnesses be present at the same time and personally hear the proposal and acceptance. If the witnesses heard only the proposal or only the acceptance

⁸⁶Al-Qur'ān, Surah Al-Baqarah (The cow) 11: 282 :

”يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدِينٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ، فَإِنْ لَمْ يَكُنَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَى“

⁸⁷Ubayadulla b. Mas'ūd, op. cit. p. 9.

⁸⁸Fatāwā 'Ālamgīriyyah: op. cit. Kānpur, Vol. ii p. 1; Ibn al-Ābidīn : op. cit. Vol. ii p. 280 (Kitāb al-Nikāḥ); Al-Marghīnānī : op. cit. Vol. ii p. 306 (Kitāb al-Nikāḥ).

or one witness heard only the proposal and the other heard only the acceptance, the marriage shall not be deemed to have been duly constituted.⁸⁹

A great Hanafi jurist of his time, Shams al-Dīn al-Sarakhsī (d. 483 A.H.) in his famous book, *A-Mabsūt* quoting Muḥammad al-Shayabānī states, "If a man marries a woman without witnesses or marries in presence of one witness and thereafter he completes the requirements of evidence, the marriage shall not be valid inasmuch as what is essential is the hearing of evidence (at the time) of contract which is not there. Later on, what is left is the evidence or acknowledgement of a *fāsīd*, irregular contract and the acknowledgement of a *fāsīd* contract is not a contract; bearing evidence on a *fāsīd* contract does not turn it into a *ṣaḥiḥ*, valid contract".⁹⁰

It is, thus the universal view of all the *Sunnī* Schools of *fiqh* that a marriage which is performed in the absence of witnesses or in the presence of one witness is only *fāsīd*,⁹¹ i.e. irregular and not void.

Pakistan View :

In the case of "*Bagh Ali Versus Anisa*", reported in P.L.D. 1968 Lahore 1216, the question arose whether a marriage having been performed in the presence of one witness and the *nikāḥ-khawān*, (one who performs the marriage ceremony) fulfils the condition of the minimum number of witnesses or not? The lower appellate court held that the respondent had not produced two witnesses of the *nikāḥ* required by law. Justice A.R. Shaikh, of the West Pakistan High Court, Lahore, in the second Appeal, observed, "We have only the *nikāḥ-khawān* and one other witness. This is not a sufficient proof of the alleged marriage, especially when the depositions of the said two witnesses have been found to be unreliable".

Although the learned Judge seems to have doubted the reliability of the depositions of the witnesses and the appeal appears to have been dismissed on that ground, it would not, perhaps, be improper to say that the required number of witnesses was present in this case as it was on record that, "We have only the *nikāḥ-khawān* and one other witness". The *Nikāḥ-khawān* (the person who performed the marriage ceremony) too, was a witness to the

⁸⁹Al-Kasānī : op. cit. vol. ii p. 255 ; Ibn Al-Ābidīn : op. cit. vol. ii p. 280

⁹⁰Al-Sarakhsī : op. cit. vol. v. p. 35 ;

"ولو تزوج امرأة بغير شهود أو بشاهد واحد ثم أشهد بعد ذلك لم يجز النكاح لان الشرط هو الأشهاد ولم يوجد وإنما وجد الأشهاد على الإقرار بالعقد الفاسد والإقرار بالعقد الفاسد ليس بعقد والأشهاد عليه لا ينقلب الفاسد صحيحاً"

⁹¹Ibn al-Ābidīn : op. cit. Vol. ii p. 623 :

"نكاحاً فاسداً هي المنكوحة بغير شهود"

marriage, and the observation of the lower court in the first appeal, that "the respondent has not produced two witnesses of the *Nikāḥ* required by law," appears to be misconceived.

Eligibility or Competency of witnesses :

There is a consensus of opinion that a witness must be free (citizen), sane, major and a Muslim.⁹² According to Abū Ḥanīfah and Qāḍī Abū Yūsuf, however, in cases where the woman belongs to the people believing in a revealed Book (i.e. Jews or Christians) the witnesses may be non-Muslims. The view of Muḥammad Al-Shaybānī and Zufar, Al-Shafi'ī and Ahmed b. Hanbal, however, is that in all cases the witnesses to a marriage must be Muslims, irrespective of whether the couple are Muslims or the woman is of the people believing in a revealed Book.⁹³

The difference of opinion has, perhaps, emerged out of interpretation of the word "رجالكم" (your men) occurring in the above quoted verse (11 : 282). The latter group limits the word "your men" to Muslims only, because according to them, in this verse the Muslims have been addressed, while Abū Ḥanīfah and Abū Yūsuf put a wider interpretation and try to apply the rule to a situation in which the woman to be given in marriage is a non-Muslim and, thus, the witnesses to such marriage may be non-Muslims, who will naturally be people from the woman's side.

Integrity of witnesses :

If a witness is *fāsiq*, (a reprobate person) or blind or is guilty of slander (*Maḥdūd fil Qaḍḥaf*) or is the son of one of the marriage contracting parties, his capacity to bear evidence shall not be affected and his bearing evidence, according to Hanafis, will be valid. Whereas according to Imam Shafi'ī if the witness is a known *fāsiq*, his integrity shall be affected and even his bearing witness shall not be proper. He holds that it is at all times necessary for a witness to be just. He totally disregards the evidence of a blind person.⁹⁴

Abū Ḥanīfah makes a fine distinction between a person who happens to be present at the *nikāḥ* ceremony and bears witness of marriage and the

⁹²Ibn Nujaim : *Bahr al-Rā'iq*, Cairo, Vol. iii p. 95:

"وشرعاً في الشاهد أربعة امور الحرية والعقل والبلوغ والاسلام فلا ينعقد بحضرة العبيد والمجانين والصبيان والكفار في نكاح المسلمين"

⁹³Fatāwā 'Ālamgiriyyah: op. cit. Vol. ii p. 1; Al-Quḍūrī, op. cit. p. 147; *Kanz al-Daqa'iq* : op. cit. 97, (on Margin) :

وقال محمد لا يجوز وبه قال زفر والشافعي واحمد لا شهادة للكافر على المسلم ...
 وصح تزوج ذمية عند ذميين

⁹⁴*Kanz al-Daqa'iq* : op. cit. p. 97.

witness who gives evidence before a court. He means to say that the qualification of a witness, whether he is just or not, becomes relevant only when he appears before a court to give evidence. Therefore, if a witness is lacking in integrity at the time of marriage contract, it is no impediment to his legal capability of being a marriage witness and the *nikāḥ* will be deemed to have been validly performed. If he is found to be *fāsiq*, at the time of giving evidence in court, his evidence will of course be rejected.⁹⁵

Suggestion :

The Evidence Act, 1872, as in force in Pakistan, does not take cognisance of the provisions of Islamic Law of Evidence relating to the eligibility and integrity of the witnesses to a Muslim marriage. The Islamic Law of Evidence relating to marriage may be dealt with in two categories : evidence constituting the *nikāḥ* and evidence in proof of *nikāḥ*. So far as the rules of evidence relating to the constituting of *nikāḥ* are concerned they form part of the substantive law of marriage contract. They should be strictly adhered to in the matters of Muslim marriage contracts, for instance, the witnesses must be Muslims. Therefore, it is hereby suggested that the Evidence Act, 1872, the Muslim Family Laws Ordinance 1961 and the Family Courts Act, 1964 should be brought in conformity with the provisions of Islamic Law of Evidence relating to Muslim marriages, their dissolution and other matters falling within the ambit of Muslim Personal Law.

Presumption of Marriage—Pakistan View :

Presumption in favour of marriage may arise, in the absence of direct proof of the *Nikāḥ*, from prolonged and continued cohabitation as husband and wife or the acknowledgement by the man of the woman as his wife. This presumption, however, does not arise if the conduct of the parties was inconsistent with the relationship of husband and wife or if the woman was admittedly a prostitute before she was brought to the man's house. In her case marriage can be inferred only if there is a valid *nikahnama* in existence. (PLD 1968 Lah. 587; 20 DLR (W.P.) 176 (DB), Sajjad Ahmed & Muhammad Akram JJ). There are cases where marriage is presumed from prolonged and continued cohabitation. But where according to the plaintiff's own case the duration of cohabitation is only for period less than a year, one cannot draw the presumption as to a valid marriage, even if the entire evidence of the plaintiff on this point is accepted. (PLD 1969 Dacca 47; 21 DLR 213; PLR 1968 Dacca 759. 'Abu Muhammad Abdulla, J.) Marriage, in absence of direct evidence is presumed from (i) prolonged and continued cohabitation as husband and wife ; (ii) acknow-

⁹⁵For detail see Ibn Humām : *Fath al-Qūdīr*, Cairo vol. ii p. 353.

ledgement of paternity of child. (Muhabat v. Abdullah : PLD 1970 Lah. 303 at P. 313, Karam Elahi Chauhan and Muhammad Siddiq. JJ.).

Legal Prohibitions to Marriage :

The capacity to marry requires that there should be no legal disability or bar to the union of the parties. They should not be within the prohibited degrees or so related to or connected with each other as to make their union unlawful.

There are four kinds of legal prohibitions to marriage contracts, namely :—

1. Prohibition on account of consanguinity.
2. Prohibition on account of fosterage.
3. Prohibition on account of affinity.
4. Relative or Contingent prohibitions.

I. Prohibition by Consanguinity:—The prohibitions founded on consanguinity (*taḥrīm al-nasab*) are the same among the *Sunnis* and the *Shi'ahs*. Marriage with mother, daughter, sister, aunt, niece, however high or low in degree, is absolutely prohibited. Similarly, it is prohibited to contract marriage with one's illegitimate child or his or her descendants. Illegitimate relationship creates the same prohibition as legitimate relationship.

II. Prohibition based on fosterage :—This prohibition arises out of fosterage (*taḥrīm al-raḍa'at*). The marriage with foster mothers and foster sisters on account of fosterage is absolutely prohibited. The prohibition caused by fosterage is perpetual like that of consanguinity. Thus, it is not lawful for a man to marry his mother by fosterage, nor his sister by fosterage, by reason of the clear Qur'ānic text—"prohibited to you (for marriage) are...your foster mothers (who gave you suck) and your sisters by fosterage"^{95a} and the saying of the Prophet, "What is unlawful to you by consanguinity is unlawful to you by fosterage".^{95b}

Prohibition is induced by suckling, whether it be little or much, provided that it takes place within the prescribed period. The little, however, must be understood as what is known to reach the stomach; and the period of suckling, according to a saying of Abū Ḥanīfah, is thirty months; though the disciples have said that it does not extend beyond two years. When the full period has expired, the illegality by fosterage is not established by suckling after it.

^{95a}Al-Qur'ān, Sūrah Al-Nisā' (The Women), iv: 23,

” حرمت عليكم امهاتكم النبي ارضعنكم واخواتكم من الرضاعة “

“As the prohibition by fosterage is established on the part of the mother, so also it is established on the part of the father, that is, the person by connection with whom the milk has been induced (in the foster mother).

To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited ; so that if his nurse should have already borne, or should thereafter bear, a child to the same or to another man, whether before the nursing or after it, or should have nursed another infant; or if the man have a child by another woman, whether before this nursing or after it, or such woman should nurse another infant on her milk, the whole be brothers and sisters to the first suckling, and their children would be his nephews and nieces, and the brother and sister of the man would be his paternal uncle and aunt, and the brother and sister of nurse would be his maternal uncle and aunt ; and in like manner as to his grandfather and grandmother. The prohibition of affinity is also established by fosterage, so that the man's wife would be unlawful to the suckling, and the wife of the latter be unlawful to the man, and by the same analogy, in all other cases except two :

- (i) It is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage ; for the former must be either his own daughter or his step-daughter, while the latter is neither ;
- (ii) It is not lawful for a man to marry the mother of his sister by consanguinity, while it is lawful in fosterage ; for, in the former case, she must either be his own mother or his father's wife ; and, in the latter case, this objection does not exist. The sister of one's brother by fosterage is lawful in the same way as his sister by descent would be ; as, for instance, when a man's half-brother, by the father has a sister by the mother's side, it is lawful for the man to marry her. In fosterage, the mother of one's brother, or of his paternal or maternal uncle or aunt, is lawful to him. And, in like manner, it is lawful for one to marry the mother of his nephew and the grandmother of his child by fosterage ; but this is not lawful in consanguinity, so, also, it is lawful to marry the aunt of one's child by fosterage, and so the mother of his son's sister, and the daughter of his child's brother, and the daughter of his child's paternal aunt. And in like manner it is lawful for a woman to marry her sister's father, son's brother, niece's father, child's grandfather, or child's maternal uncle by fosterage ; though all these are unlawful when the relationship is established by descent.” (Baillie p. 194-95). For further discussion on the subject, see section 28 *infra*.

The rule of the prohibition has been aptly composed in the following Persian couplet :

از جانب شیرده همه خویش شوند
و از جانب شیرخواره زوجان و فروع

Fosterage is made manifest or established in two ways, viz. either by acknowledgement or by proof; and no proof is received except the testimony of two men, or one man and two women, all of whom must be just persons. Further, no separation can be made on account of fosterage, except by order of the judge. But when attestation is made to a woman after her marriage, by two men or by one man and two women, being just persons, she ought not to remain with her husband, as their attestation would be sufficient to establish the fosterage before the judge.

III. Prohibitions by affinity :—Prohibition of marriage is also created because of affinity. Marriage with a woman prohibited on grounds of affinity is void. The following are prohibited by reason of affinity :—

- (a) Mothers of wives and their grandmothers by father or mother's side.
- (b) Wife's daughter or grand-daughter howsoever low. This is the case only when marriage has been consummated with wife, otherwise not. Thus when marriage has not been consummated one may marry the daughter of one's wife by another marriage. In this case consummation does not include valid retirement.
- (c) Wife of a son or a son's son or a daughter's son howsoever low.
- (d) Wives of father or grandfather, whether on father's or mother's side, and howsoever high.

In case of a valid marriage the prohibition by affinity is operative by the mere factum of marriage, but if the marriage is irregular (*fāsid*) it is operative only after consummation⁹⁶ (Baillie, p. 24-25).

Similarly, the prohibitions of marriage are also created by fornication, inasmuch as the mother and daughter of such woman, howsoever high or low they may be, become prohibited to such man. The principle, according to *Hanafīs*, is that the prohibition of affinity is created not only by a valid or *fāsid* (irregular) contract of marriage, but also by adulterous intercourse. Even a woman who has been touched with sexual lust by a man becomes forbidden to his ascendants and descendants and her female descendants and ascendants become forbidden to him.⁹⁷

⁹⁶Ubaydullah b. Mas'ūd : op. cit. vol. ii, p. 64-65; Baillie : op. cit. p. 24-25.

⁹⁷Ubaydullah b. Mas'ūd : op. cit. vol. ii, p. 64-65.

The rule applies to both man and woman. As a man cannot marry his son's wife, so a woman cannot marry her daughter's husband. Accordingly, sisters full, consanguine or uterine by valid or *fāsid* marriage or adulterous connection are forbidden. It equally applies to the daughters of such sisters as well as the aunts by *nikāḥ* or adulterous connection. According to Shafi'is, however, an adulterous connection does not give rise to the prohibition of affinity. In this, they differ from both the Ḥanafis and the Shi'as.

IV. Relative or Contingent Prohibition :

Prohibitions by consanguinity, fosterage and affinity are perpetual. There are, however, other prohibitions which are temporary in nature. They may be termed as Relative or Contingent.

Relative or Contingent prohibitions are those which spring from different causes, for example, marriage : with a woman who is in the marriage of another man, of a woman who is undergoing the waiting period (*'iddat*) on account of either divorce by or death of her husband ; of the person who in the presence of his four wives, marries a fifth wife ; or of one who marries a woman who is pregnant, and whose pregnancy is proved; marriages with such women are prohibited till such time that the cause of prohibition exists and is not removed.⁹⁸ Marriage with the sister of a wife who is in his wedlock is also prohibited. He is, however, at liberty to marry that sister after he divorces his first wife or she dies. The conjunction of two such women, of whom if one of them is supposed to be a man, marriage between them would be prohibited, for example the conjunction of aunt and niece in marriage,⁹⁹ is on that account prohibited.

Section 19. (I) Every *nikāḥ* duly performed under the Registration of marriage. *Shārī'ah* will be registered.

2. The Provincial Governments shall appoint Registrars who will register the *nikāḥ* in accordance with law.

3. An intimation of every such *nikāḥ*, which has not been performed by or in presence of the Registrar of *Nikāḥ*, shall be given to the Registrar of *Nikāḥ* by the person who had performed the *nikāḥ*.

4. The registration of *nikāḥ* shall merely be a *prima facie* evidence of *nikāḥ*, which may be rebutted by other evidence.

⁹⁸Dāmād Āffandi : op. cit. vol. i, p. 322 ; 'Ubaydullah b. Mas'ūd : op. cit. vol. ii, p. 64-65 ; Ibn al-'Ābidīn : op. cit. vol. ii, p. 283

⁹⁹Ibid.

5. In case of failure to get a *nikāḥ* registered, without a just cause, the person at fault may be sentenced with simple imprisonment for a term which may extend to one month or with fine not exceeding Rs. 500.

COMMENTARY

The provision for the registration of marriage is not found in the Holy Qur'ān or the *Sunnah*, but there are equally no prohibitory provisions as well. Muslim Jurists are, however, of the view that the writing of marriage (*kitābat*) is desirable.¹⁰⁰ It may, however, be clearly noted that the registration or non-registration of marriage does in no way affect the legality or validity of marriage. If a *nikāḥ* has been duly performed according to the *Shari'ah*, it is quite valid ; mere non-registration will not affect its character. The condition of registration is, therefore, merely auxiliary. It is not a constituent condition of a marriage contract.

The purpose of the enforcement of registration is to remove the difficulties of proving marriage and the dower. Therefore, there is no impropriety, according to *Shari'ah*, in appointing a Registrar, to achieve the above objectives.

Modern Legislation relating to Registration :

Registration of marriage has now become a necessary legal formality to marriage in most of the Muslim countries, as detailed below :

Algeria :

The Algerian Marriage Ordinance and its explanatory Decree provide detailed rules for solemnization and registration of marriage. Thus, When the parties to an intended marriage notify their consent to the Qāḍī, as required under article 2 of the Ordinance, he will send the necessary records to the civil officials within three days and they will register the contract and issue a certificate. If the notification is sent directly to the civil officials themselves, they will register the marriage. In the latter case, marriage ceremonies may take place after a certificate of marriage is received. (The Ordinance of 1959, article 3).

Before issuing a certificate the Qāḍī or the civil official, as the case may be, shall ascertain names, places and dates of birth of the parties, their parents and witnesses. He shall also satisfy himself if the parties have freely consented to the proposed marriage and also, in the case of a minor or interdicted person, if permission of such person's guardian has been obtained. (Decree No. 1082 of 1959, article 4).

¹⁰⁰See Ibn Humām's *Fāṭḥ al-Qadīr*, *Kitab al-Nikāḥ*, (*Tasjīl al-Nikāḥ*).

Iran :

The present Iranian law requires that every marriage must be duly registered in accordance with the prescribed rules ; failure to do so will not affect the validity of the marriage but is punishable under law. (The Marriage Law, 1931, article 1). Before a marriage is registered, the parties shall be asked to produce certificates of medical fitness. (Production of Medical-Fitness Certificate Law, 1938, article 1).

Indonesia :

The Law of 1946 provides for registration of all marriages taking place in the country. Under this law, it is compulsory for the parties to marriage to register it with the marriage officials. A detailed procedure for such registration is laid down by the rules framed under this law. The validity of a marriage shall not, however, be affected by the failure to comply with the requirement of compulsory registration.

Malaysia :

The Enactments in Malaysia provide for compulsory registration of marriage. In all the States, it is made clear by the law that neither would non-registration invalidate nor mere registration validate a marriage which is otherwise valid or invalid under Islamic law ; but the failure to register a marriage is an offence in most of the States. (Slengor, sections 121, 160 ; Kelantan, sections 144, 180 ; Trengganu, sections 102, 138 ; Pahang, sections 124, 159 ; Penang, sections 116, 152 ; Melaka, sections 115, 151 ; Negri Sembilan, sections 116, 154 ; Kedah, sections 116, 154 ; Perak, sections 3, 6 ; Johore, section 7 ; Perlis, sections 87, 120 ; Sabah, section 5).

In Brunei, a marriage not solemnized by a person holding a delegated authority from the Ruler must take place in the presence and with the permission of a Registrar. Every marriage is to be registered under the Enactment of 1955, unless it contravenes any provision of Islamic law, in which case it shall be void and cannot be registered. (Sections 137-138, 143).

In Singapore, every marriage is to be registered under the Muslims Ordinance, 1957 (Sections 12, 16), but neither shall non-registration affect the validity of a marriage nor mere registration validate a marriage otherwise invalid in Islamic law. (Section 19).

Ceylon :

Every Muslim marriage is to be registered immediately after the conclusion of the nikāḥ ceremony. The responsibility to register the marriage lies with the bridegroom, the bride's guardian (if his consent to the marriage was necessary under the Muslim law and was not dispensed with by the Court), and the person who conducted the nikāḥ ceremony. (Section 17).

For the purpose of registration, these persons have to make declarations relating to the details of the marriage in the prescribed forms. The law, however, makes it clear that failure to register a marriage shall not affect the validity of a marriage otherwise valid under Muslim law ; neither shall the mere fact of registration validate a marriage which is otherwise invalid under Muslim law. (Section 17). Failure to register a marriage, as required by law, is an offence punishable under the Act. (Section 18).

Pakistan :

In Pakistan, by Section 5 of the Family Laws Ordinance VIII of 1961 the registration of marriage has been made compulsory. In case of default, simple imprisonment upto 3 months or fine to the extent of Rs. 1,000 may be imposed.

According to some 'Ulama of Pakistan, it is not proper to treat the non-registration of marriage, as an offence. The present author does not agree with this view. If it is assumed that the registration of marriage is a commendable act, the Authority or the Legislature must have the power to enforce it and make it mandatory. Otherwise, there shall be no sanction behind it. In some Muslim countries, like Syria, the registration of marriage has been made compulsory, but its default has not been made punishable. Consequently, the people there are not generally abiding by this law. The jurists of Syria therefore, are contemplating, rather pressing the Legislature to make non-registration of marriage a penal offence. (vide commentary of Qanūn Al-Aḥwāl Al-Shakhsiyyah, Syria, by Mustafa Al-Saba'ī).

Analysis :

As a general rule, a marriage which is not registered is not invalid, although the parties may be liable to statutory penalties. In Pakistan, for example, under the terms of the Muslim Family Laws Ordinance, 1961, failure to register a marriage in the prescribed manner renders the performer of such marriage and the parties thereto liable to three months imprisonment or a fine of 1,000 rupees or both. Generally, too, a marriage may be proved by means other than the official registration. But in Egypt since 1931, and in Tunisia since 1957, a marriage can be proved only by the official certificate of registration. In both these countries, therefore, the effect of the procedural regulation appears to deny judicial relief to the parties to an unregistered marriage which is disputed ; and this may result in an inability to establish a claim of inheritance as a spouse relict. This is plainly against the spirit of the injunctions of Islām.

Suggestion :

In view of the fact that the masses of this country (Pakistan, and this holds true of any other Muslim country where the masses are illiterate and

the registration of marriage has been made compulsory) are not accustomed to registration of marriage and are not familiar with the formalities of registration, it will be proper if a lenient view is taken in the matter of its non-registration. The present author would, therefore, suggest that the maximum sentence should be reduced to one month and the fine be brought down to Rs. 500. The old Registration of Marriages Act of Sind too was to this effect. This suggestion stands incorporated in the law codified above. It is also necessary to clarify the legal implication of non-registration of a marriage. Mere non-registration should not be a bar to prove the marriage by means of other legal evidence. It may further be suggested that since the repeal of the Basic Democracies Order, 1959, the work of registration of marriage is all in hotch potch. It is, therefore, expedient if separate Registration Offices are established at every place and the record is maintained properly.

Section 20 (1). No person, during the continuance of an existing marriage, shall be empowered to contract another marriage, without the prior written permission of the Family Court of the Area concerned which shall be established by the Provincial Government concerned.

(2) The said Family Court may give its permission after it is satisfied that :

(i) the person has sufficient financial means ;

(ii) according to *Sharī ah*, it is just and expedient to permit the second marriage during the subsistence of the marriage with the first wife ; and

(iii) there is no reason to believe that the said person shall not act equitably between the wives, in case permission is granted to him.

(3) It shall not be necessary to have the consent of the existing wife, or wives in granting permission to contract another marriage.

(4) If any person without the said permission contracts another marriage during the subsistence of his other marriage, he shall be sentenced to simple imprisonment which may extend to six months or with fine upto Rs. 5000/- or both.

Explanation : The above provisions shall *mutatis mutandis* apply to any subsequent marriage during the subsistence of the previous one or ones.

COMMENTARY

To deal with the question of polygamy, a Muslim, at the first instance, has to turn to the Holy Qur'ān for inspiration and guidance. The verse—¹⁰¹ “فَانْكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنً وَثُلَّةً وَرَبْعَ” dealing with the problem of polygamy, lays down that the husbands have the option of having (upto) four wives at a time, provided the husbands possess the capacity of dealing justly amongst their wives in all respects.

The second part of the verse—¹⁰²فَانْخَفُوا اِلَّا تَعْدِلُوْا فَوَاحِدَةً however, directs a Muslim, in case of his being apprehensive of not being able to deal out justice and maintain equality among his wives, to be content with one wife only.

Polygamy—Only a 'leave' :

Polygamy is only a 'permission' with limitations put on it. In the presence of the above Qur'ānic provisions, one has to ponder whether polygamy, in an unrestricted form, should be allowed in Pakistan, and, for that matter in other parts of the Muslim world.

Equality or Equity : It is argued that dealing out justice and maintaining equality of treatment among the wives, are conditions precedent to having more than one wife at a time. The conditions imposed make polygamy beyond the reach of the Muslims of Pakistan, in general. Generally, again, the character and conduct of the Muslims has so much deteriorated that the fear of Allah and the sense of mutual obligations have almost become extinct. Such Muslims are undoubtedly expected to misuse the option of polygamy granted to them by their religion. They are expected to neglect criminally one wife in preference to the other. A polygamous family, under the circumstances, would present an unhappy picture altogether, quite different from the one envisaged by the Holy Qur'ān. The senior wife or wives would, invariably, be neglected and children from them would be deprived of proper love, sympathy and care of their father. Economic and other complications of domestic life would stare them in face. Consequently, the entire family would be subject to untold miseries.

As discerning people hold, equality and equity are not synonymous. The Qur'ān by 'adl (عدل) refers to equitable treatment of wives more than

¹⁰¹Al-Qur'ān, sūrah Al-Nisa' (The Women), iv: 3.

¹⁰²Ibid.

one. Theoretical equality is impossible however pious the man and the society. So Allah has in *sūrah* Al-Nisā' IV : 128, 129, laid down the standard of equity among wives. (For further discussion, see Maudūdī's "Tafhim al-Qur'ān," and Mufti Muhammad Shafī'ī's "Ma'ārif al-Qur'ān, commentary of the verse relating to 'adl (عدل) and other relevant verses).

Intervention of State :

A Muslim State, therefore on principle, has to intervene and impose restrictions, through proper legislative measures on the option or leave of having more than one wife at a time.

Pakistan View :

Maulana Sayyid Abu al-A'lā Maudūdī of Pakistan in his article "Nikāḥ Kitābiyyah" where he advocated for putting restrictions on Muslim's marrying a *kitābiyyah*, observed that in respect of all the permissions or leaves granted by the Shari'ah, where it is apprehended that those permissions and leaves will be misused, the Ruler of the Muslim State is empowered to issue prohibitory orders which can be enforced without converting lawful acts into unlawful and unlawful acts into lawful.¹⁰⁴

The intervention of the State, here, must not be construed as interference in religious injunctions, inasmuch as in terms of *fiqh* the option, of having more than one wife, is merely a *Rukhsat* (permission) granted by Allāh, and not 'azīmat (fixed rule).

Egyptian View :

Sayyid Muḥammad Rashīd Raḍa, a learned scholar of Egypt, holds that polygamy, in view of the possibility of mischief arising therefrom, must be put a stop to. Islam, in deed, empowers the 'Imam' to stop people from committing an act, which though legal, has the possibility of creating mischief. Achieving substantive good is better than creating possibilities of evil.

Another famous scholar of Egypt, the late Mufti Muḥammad 'Abduh, discussing polygamy in his famous commentary on the Holy Qur'ān, Al-Manār¹⁰³ argues that in the early period of Islam, Polygamy, though it served the purpose of mitigating tribal differences and strife and in strengthening family ties, had little chance of disclosing its dark aspects due to the fresh religious zeal and deep religious knowledge. The present day Muslims could safely be allowed polygamy if they were possessed of the same untainted religious outlook and followed the tenets of Islam with the same strictness and zeal as did the Muslims of the early period of Islam. In the context

¹⁰³Vol. iv. p. 349-50

¹⁰⁴Tarjumān al-Qur'ān, Muharram 1356 A.H.

Rule 14. "In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage, the Arbitration Council may, without prejudice to its general power to consider what is just and necessary, have regard to such circumstances, as the following amongst others:—

Sterility, physical unfitness for the conjugal relation, wilful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife."

Turkey & Cyprus :

The Turkish Code provides that no person shall marry again unless he proves that the earlier marriage has been dissolved by the death of either party or by divorce or by a decree of nullity, (Article 93) ; and that a second marriage may be declared invalid by the Court on the ground that a person had a spouse living at the time of marriage, [Article 112 (1)]. The same is the position under the Turkish Family Law of Cyprus. [Section 8, 19 (a)]. There is, however, an exceptional rule under the Turkish Code, not found in the Cypriot law, providing that where a person marries, in good faith, another person who is already married and the former marriage is subsequently dissolved, the second marriage shall not be declared invalid, (Article 114). The permission of polygamy given by the Qur'ān subject to certain specified conditions has, thus, been voluntarily abandoned by the Turkish Muslims. The reason for this, as stated by some Turkish scholars, was that the Qur'ānic legislation on the subject was "a great improvement over the unlimited polygamy of pre-Islamic Arabia, thus pointing out the way to monogamy," and that the changed social and economic conditions of the Turks had made the Qur'ānic conditions for polygamy "unrealisable," (Article 114).

Lebanon :

The Law in Lebanon does not prohibit polygamy. It only provides some safeguards in connection therewith, (Articles 38, 54 (b) and 74). Thus, in accordance with the traditional Qur'ānic law, it prohibits plurality of wives beyond the maximum of four and also enforces the Qur'ānic injunction regarding equality of treatment between co-wives. It further recognises the validity and judicial enforceability of a stipulation in a marriage-contract providing that in the case of husband's bigamous marriage either the first or the second wife would stand divorced.

Syria :

Article 17 of the Syrian law authorises the Court to refuse to a person who is already married permission to marry another woman, if it is established that he cannot maintain two wives. This was the first statutory provision made in the Arab world restricting a man's power to contract a

bigamous marriage. According to the interpretation given by the Shāfi'ī school, the Qur'ān subjected the permission for plurality of wives to the condition of the husband's financial capability to provide maintenance to more than one wife. The Shāfi'ī view represented in a particular form the basic and essential nature of the policy of Islamic law towards bigamy which it rather permitted as a remedial measure with a view to avoiding greater social evils. (For a discussion of the nature relating to the Islamic law of bigamy and the opinions of various jurists of Islam on it, See Tahir Mahmood; *'Dissuasive Precepts in Muslim Family Law'*, 2 *Alig. L.J.* (1965) 122-126; also by the same author *'Control of Polygamy : Islamic Doctrines'*, *Radiance Views Weekly*, Delhi, 15 Aug. 1971, 33). Article 17 of the Syrian law authorises the Qādi to decide, on the basis of evidence, the question of financial capability of a person to maintain two wives, and in case he is not so capable, to refuse permission for the second marriage. This restrictive provision was based on the Qur'ānic verse about polygamy itself.

Morocco :

The treatment of polygamy in the Moroccan Code is significantly different from the Tunisian reform on the subject. Article 30(1) of the Moroccan Code provides that if any injustice between the co-wives is feared, plurality of wives is not permitted. No provision is, however, made by the Code for inquiry by any authority into a husband's capacity to do justice between the co-wives in the event of his contracting a bigamous marriage. The aforementioned provision, therefore, constitutes a reiteration of the Qur'ānic injunction that if one finds oneself unable to treat the co-wives equitably, one must confine himself to a single wife. (According to the present writer, that is the correct approach).

The Moroccan law, however, provides certain other rules relating to polygamy : Firstly, no second marriage with a woman shall be contracted unless the fact of the man being already married is communicated to her [Article 30(2)]. Secondly, a woman may stipulate in her marriage contract against her husband's right to contract a bigamous marriage ; in such a case, if the stipulation is violated, the wife shall have a right to dissolution of her marriage, (Article 31). Thirdly, even in the absence of such a stipulation, if the second marriage causes injury to the first wife, the Court may dissolve her marriage, [Article 30(2)]. The Code once again stresses that if a man has more than one wife he must treat the co-wives equitably in accordance with the Qur'ānic injunction, (Article 35).

Tunisia :

Article 18 of the Tunisian Code says that "plurality of wives is prohibited." It also provides a penalty for persons marrying again during

the subsistence of a valid marriage. Till 1964 there had been a controversy in Tunisia over the correct interpretation of the provisions of article 18. It was doubtful if a bigamous marriage would be invalid *per se* or would only make the husband liable to the prescribed penalty. The Amendment Law of 1964 settled the controversy by including bigamous marriages in the list of invalid (*fāsid*) marriages. (Article 21 as amended by Law No. 1 of 1964).

Iraq :

The law relating to polygamy as presently applicable in Iraq is found in Article 3 of the law of 1959 read with the provision of the Amendment Law of 1963 modifying article 13 of the main Act. According to article 3, a man who wants to contract a bigamous marriage must apply to the Court for its permission. The Court shall give him such permission on three conditions: first, he should be financially capable of maintaining two wives simultaneously; secondly, some 'lawful benefit' should be involved in the second marriage, and lastly, there should be no fear of injustice between co-wives, the ascertainment of which fact is to be made by the Court itself. The Court shall not give the permission if, in the circumstances of the case, it finds that injustice between the co-wives may take place, even if the other two conditions are fulfilled. A man who contracts a bigamous marriage without seeking the Court's permission or in disregard of its denial thereof, shall be guilty of an offence punishable by law.

Article 13 of the Law, as originally enacted in 1959, described permanent and temporary impediments to marriage. It mentioned 'marriage with more than one woman without the permission of the Qāḍī' as a marriage barred by a temporary impediment. So, a bigamous marriage without the Court's permission was held to be irregular (*fāsid*). This provision was, however, not agreed to by the 'ulamā' of Iraq as, in their opinion, man-made laws could, if necessary in the interest of the society, impose restrictions on something which was permissible under the divine law but could not declare it invalid altogether. The personal Status (Amendment) Law, 1963, therefore, modified article 13 of the Law of 1959 so as to delete from it any reference to bigamous marriages. A bigamous marriage contracted in violation of the rules laid down in article 3 will, therefore, not be invalid; it will only entail penal liabilities mentioned in article 3 (6) of the Law, as that of Pakistan.

Iran :

The Marriage Law of Iran of 1931 requires that if at the time of marriage a man is already married he must inform the woman about the fact of his first marriage; his failure to do so is an offence, (Article 6). To this rule, the Family protection Law of 1967 adds that a person desiring to contract

a bigamous marriage must seek the prior permission of the Court, (Article 14). Before giving such permission, the Court shall satisfy itself about the capacity of the husband to maintain more than one wife and to treat the co-wives equitably. A person violating this requirement shall incur the penalties laid down in the Marriage Law of 1931 for the offence of contracting a bigamous marriage by concealment from the second wife of the fact of the first marriage, (Article 6). A wife whose husband has contracted a second marriage, with or without the Court's permission and against her own wishes, may seek dissolution of her marriage through the Court. [The Family Protection Law, 1967, article 11(c)].

Malaysia :

The only provision under Malaysian law relating to bigamy is found in Sarawak. There, it is provided by law that a man is permitted to marry more than one woman only if he can prove that he is capable to maintain more than one wife. The scale of maintenance payable to a wife is prescribed by law, and if a husband has considerable means so as to provide such maintenance to more than one wife, he may be permitted to contract a second marriage, (section 37).

Besides the aforementioned law in the State of Sarawak, Administrative Rules in two other States, Selangor and Negri Sembilan, provide that a person contracting a marriage must declare, in a prescribed form, that he is already married and that if he makes such a declaration "further inquiries will be made." It is, however, not specified what inquiries are to be made and what further steps to be taken in the matter; probably the financial capability of the husband to maintain two wives will have to be ascertained.

In none of the aforesaid three States there is any provision specifying or suggesting that a bigamous marriage, if contracted without the required financial capability, shall be invalid.

There is no provision relating to polygamy in the law of Brunei. In Singapore, an amendment introduced in 1960 into the Muslims Ordinance of 1957 deals with bigamous marriages. It provides that a bigamous marriage can be solemnized only by the Chief Kathi or, with his permission, by a kathi or the bride's guardian. Before solemnizing or permitting such a marriage, the Chief Kathi shall satisfy himself that there is no impediment, under Islamic law to the proposed second marriage, [Section 7A(2) & (3)]. In order to satisfy himself in that regard, the Chief Kathi has to make all necessary inquiries. The Muslim Marriage and Divorce Rules, 1959 of Singapore require that the notice of a bigamous marriage must be given to the Chief Kathi at least fourteen days before the date of marriage in order to enable him to make such inquiries, (rule 8-C).

Ceylon :

Section 24 of the Act deals with bigamous marriages. Under its provision, a man desiring to contract a bigamous marriage cannot quietly do so. It makes provision for a wide publicity to be given to his intention. He is required to give, thirty days in advance, notice of his intention to the Qaḍīs of the areas in which his own, his existing wife's and his proposed wife's residences are situate. Each of the Qaḍīs shall thereupon cause copies of the notice to be exhibited in all the prominent mosques of his area and also at the residence of that of the three parties who lives in his jurisdiction. Thus, instead of giving authority in the matter of bigamous marriage to any judicial or administrative body, as has been done in some West Asian countries, the law in Ceylon has preferred to put a different sort of control on them. The procedure laid down in section 24 of the Act would furnish an opportunity to influential persons in all the three areas where the parties involved in an intended bigamous marriage are living to intervene and persuade the husband to change his mind, if the desired bigamous marriage is unreasonable.

A bigamous marriage contracted without compliance with the aforesaid formalities, although not to be registered under the Act, (section 24) shall not be invalid. Non-fulfilment of the conditions laid down in the Act for such a marriage shall, however, be an offence punishable under the general provisions of section 92.

Analysis :

Modern Legislation has sought to set strict limits to the practice of polygamy, if not eliminate it altogether. At the one extreme of the process of reform is the Tunisian Law of 1956, which prohibits polygamy outright. At the other is the Moroccan Law of 1958, which enacts : "If any injustice is to be feared between co-wives, polygamy is not permitted", but only allows the court to intervene by granting judicial divorce to a wife who complains of injury suffered as a result of her husband contracting another marriage. Syria, Iraq and Pakistan have adopted a middle course by requiring official permission for a polygamous marriage. In Syria the Court may refuse such permission where it is established that the husband is not in a position to maintain and support more than one wife. To this criterion the Iraqi Law adds the proviso that there must be "some lawful benefit involved" in the proposed union, and gives the court a discretion to refuse permission "if any failure of equal treatment between co-wives is feared". In Pakistan the necessary permission is to be given by an Arbitration Council, consisting of the Chairman of the local union council, a representative of the husband and a representative of the existing wife, on being "satisfied that the proposed marriage is necessary and just" and imposing "such conditions, if any, as may be deemed fit."

In Tunisia, after a great deal of reluctance, the view became acceptable to the courts that a polygamous marriage was invalid; and this was expressly stated to be so by subsequent legislation of 1964. Elsewhere, however, a polygamous marriage contracted in defiance of the various provisions is not invalid *per se*. This reflects the strength of traditionalist opposition to the reforms, particularly in Iraq where the Code of 1959 dealt with polygamous union improperly contracted in the context of impediments to a valid marriage. But an amendment of 1963 to the Iraqi Code deliberately removed "marriage with more than one wife without the permission of the court" from the list of impediments to a valid marriage. In all cases, however, infringement of the provisions entails statutory penalties. In Pakistan a second marriage without the permission of the Arbitration Council entails a three-fold sanction. The husband becomes liable to imprisonment for a period not exceeding one year, or a fine of upto 5,000 rupees, or both; he is obliged to pay forthwith the entire dower of his existing wife, even though it had been agreed that the payment of the whole or a portion thereof was to be deferred; and finally the existing wife becomes entitled to sue for judicial dissolution of her marriage in the Court of law.

In Tunisia, complete ban on polygamy and, further, declaring a polygamous marriage to be invalid is against the spirit and dictates of *Sharī'ah*.

Suggestions :

In Pakistan, the rules framed and the provisions made do not cover the entire ground. The righteous cause based on *Sharī'ah* ought to have been made the sole basis for granting permission to contract another marriage during the existence of one or more wives. A righteous claim to remarriage based on *Sharī'ah* has a range that covers all the circumstances arising in such cases. Obtaining permission from the existing wife *per force*, and constituting an Arbitration Council for the purpose wherein the existing wife is also represented, are provisions that stretch the matter too far, and have no sanction in *Sharī'ah*. Empowering a Family Court to grant permission for contracting a second marriage after a summary enquiry conducted in the light of the provisions laid down by *Sharī'ah* would have been more appropriate in the present circumstances. Since the repeal of the Basic Democracies Order, 1959, the need for dealing all matters arising under Muslim Family Laws Ordinance, VIII of 1961 by Family Courts uniformly has now become all the more imperative. The jurisdiction to entertain and hear Revision applications against any order or decision of a Family Court should exclusively be conferred on the District Courts, instead of the Collector or Deputy Commissioner or any other administrative tribunal.

CHAPTER IV

Valid, Irregular & Void Marriages

Section 21. Marriage contracted and solemnized in accordance with Sharī'ah with all its constituents and conditions, without any legal impediment, shall be a valid marriage contract.

Section 22. A valid marriage contract between a couple gives rise to the following rights and obligations :—
Effects of valid marriage

1. Lasting married relationship,
2. Husband's right to put reasonable restraints (control) over the wife, during subsistence of their marriage,
3. Right of sexual intercourse,
4. Prohibition of affinity,
5. Procreation of children and establishment of their legitimacy,
6. Wife's right of dower,
7. Wife's right of maintenance, and a life of ease and comfort, according to husband's capacity,
8. Rights of parents to inherit from the children of the marriage and rights of the latter to inherit from their parents,
9. Rights of inheritance between husband and wife, if any one of them dies during subsistence of their marriage,
10. Rights of enjoying other benefits allowed by Sharī'ah.

COMMENTARY

The Holy *Qur'ān* and the *Sunnah* of the Prophet have given to Muslims clear principles and directions in respect of the rights and duties of husband and wife. *Allāh* says, "And women shall have rights similar to the rights against them, according to what is equitable."¹

¹*Al-Qur'ān, Sūrah Al-Baqarah (The Cow), ii : 228.*

“ولهن مثل الذي عليهن بالمعروف”

Qur'anic Sanction :

By qualifying the word 'right' with the words, "equitable" or "according to custom", the significance and scope of the word 'right' has been considerably expanded and enlarged. It has further been said "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means".^{1a} Thus explained, the subordination of wife to the husband, with few exceptions, is made obligatory on her.

Marital Obligations :

According to Muslim jurists the following are some of the important obligations of a husband :—

- (a) To protect the wife.
- (b) To maintain the wife.
- (c) To treat the wife with affection and kindness.
- (d) To perform conjugal obligation to the wife.
- (e) To permit her to visit her parents and relatives.
- (f) Not to obstruct her in the performance of her religious duties.

The important marital obligations of the wife are :-

- (a) To look to the domestic comforts of her husband.
- (b) To be faithful to her husband.
- (c) To make herself available to her husband at all reasonable times.
- (d) To perform conjugal obligations to the husband and to make herself attractive to her husband.
- (e) To suckle the children during the prescribed period, if so desired by the husband, and to bring them up properly.

Details of such rights and obligations as arise between the husband and wife have been dealt with in the *Qur'ān*, the *Ḥadīth* and the books of *fiqh*.²

Modern Legislation relating to Obligations of Spouses :

Tunisia :

Art. 23. The husband must treat his wife with benevolence, live with her on good terms, refrain from causing any injury to her, and provide maintenance

^{1a} *Al-Qur'ān*, *Sūrah Al-Nisā'*, (The Women), iv: 34,

”الرجال قوا-ون على انساء بما فضل الله بعضهم على بعض وبما انفقوا من اموالهم“

²For detailed discussion on mutual rights and obligations arising out of marriage contract, reference may be had to *Fatāwā Qāḍī Khan*, *Kitāb al-Nikāḥ*, Chapter on *Huqūq al-Zawjiyat* p. 203 ; *Fatāwā 'Ālamgīriyyah*, p. 41,

to her and her children in accordance with his and her circumstances. The wife shall submit to the husband as the head of the family and, within the limits, obey him in whatever he orders her. She shall perform her marital duties according to custom and usage. The husband is not the guardian of his wife's property.

Morocco :

Art. 33. A valid marriage shall give rise to all its effects as to matrimonial rights and obligations.

Art. 34. The mutual rights and obligations of the spouses are :

- (a) lawful cohabitation,
- (b) benevolent mutual behaviour, respect and affection and joint protection of personal interests,
- (c) mutual rights of inheritance,
- (d) personal effects, e.g., paternity of children and bar of affinity.

Art. 35. Rights of wife against her husband are :

- (a) legal maintenance, including food, clothing, medical aid and lodging,
- (b) just and equal treatment, where the husband has more than one wife,
- (c) permission to see her parents in accordance with custom, and
- (d) complete freedom to deal with her property, the husband having no rights therein.

Art. 36. Rights of the husband against his wife :

- (a) protection by the wife of her body and chastity,
- (b) obedience to the husband,
- (c) suckling the children within her capacity,
- (d) supervision and management of the house, and
- (e) customary respects for the parents and other relatives of the husband.

Art. 39. If a marriage contract includes a condition opposed to *Ṣ arī'ah* or the essence or purposes of the contract, the marriage will be valid and the condition inoperative; it is not a condition opposed to the essence of the contract if the wife stipulates that she shall work in the interest of the country.

Section 23. Irregular marriage contract is the one from which some condition of a valid marriage contract is missing.

COMMENTARY

According to the point of view of Baillie³ and Syed Amir 'Ali,⁴ if the religious impediment or the cause of prohibition of marriage contract is of temporary nature, i. e. if it can be removed at any time, the marriage contract would be irregular. If the impediment, however, is of permanent nature, the marriage contract would be void and unlawful intrinsically.

To the present writer, no such distinction appears to have been made in the Holy Qur'ān and the *Ḥadīth*. The word *muharramat*, the prohibited women has been used in almost all the classical textbooks of *fiqh* to denote women with whom the marriage is unlawful, whether permanently or temporarily. Hence, at the time of marriage contract, if some religious impediment, though of temporary nature, happens to be present in a party or parties contracting marriage the mere possibility of the temporary impediment being removed cannot change the legal effect of the impediment existing at the time of marriage contract. In spite of the impediment if the marriage is contracted, it would be taken to be unlawful. If the man, however, not knowing the impediment cohabits with the woman, the dower would become due on him on the ground of his cohabiting-in-doubt, and separation would be affected between them. In such circumstances, the observance of the term of probation would be incumbent upon the woman on the ground of the possibility of her being pregnant. If a child is born it would be legitimate.

According to *Shī'ah* school of law there is no distinction between irregular and void marriages. To them the marriage is either valid or invalid (void).

Section 24 (a). If no consummation has taken place, the irregular marriage contract would be deemed to be void. In consequence thereof, no rights shall be created against each other.

Effects of irregular marriage

(b) In the event of consummation taking place, in cases of irregular marriage, the following consequences shall ensue therefrom:—

(i) Liability of specified dower or proper dower, whichever is less,

(ii) Legitimacy of issues, if claimed by the father,

(iii) Prohibition of affinity,

³Digest of Muhammadan Law, Lahore, p. 152.

⁴Muhammad Law, vol. ii, v. ed. Lahore, p. 280.

(iv) Maintenance of children,

(v) Maintenance of wife till the irregularity of marriage contract is not known,

(vi) Children's right of inheriting from both the parents,

(vii) Observance of the term of probation by the wife in the event of separation or death of the husband,

(viii) Non devolution of right to property by inheritance between the husband and wife.

(c) In the event of irregular marriage, on its irregularity becoming known, separation becomes mandatory. If they do not separate of themselves, it shall be incumbent upon the Court to get them separated. The Court shall be entitled to punish them as well.

COMMENTARY

The consequences arising out of irregular marriage contract are stated in some detail as under :—

Dower :

In the case of irregular marriage contract, if the man has had no cohabitation with the woman and separation between the two takes place, no dower would become due from the man; neither the observance of the term of probation would be necessary for the woman. If the man, however, cohabits with the woman he will have to pay the woman the specified dower or proper dower, whichever is less. If the dower be not specified the woman shall get proper dower.⁵

Child's legitimacy :

The child's legitimacy, be the cohabitation valid or invalid, is established from his mother. It is established from the father's side only in three cases, viz :

1. In case of valid marriage.
2. In case of cohabitation-in-doubt in irregular marriage, if the child is claimed by the man.
3. In case of acknowledgement by the father (subject to certain conditions).

⁵*Fatāwā 'Ālamgīriyyāh*, Kanpur, op. cit. *Kitāb al-Nikāh*, Chapter on *Nikāh al-Fāsid*, p. 35.

Sanctity of Affinity :

In an irregular marriage, if consummation takes place, prohibition of affinity will be established, even though the cohabitation be unlawful. The basic reasoning comes from the Qur'ānic verse, "Prohibited to you (for marriage) are...your step daughters under your guardianship, born of your wives to whom ye have gone in,—no prohibition if ye have not gone in;^{5a}." In this verse *Allāh* has made unlawful the contracting of marriage with the daughters (from other husbands) of the woman with whom one has already cohabited. On this basis, an important rule has been framed, "One's marrying a daughter renders her mother *ḥarām*, prohibited to him, and cohabitation with mother makes her daughters *ḥarām*, prohibited to him^{5b}". Under this rule, in the event of a man having been married simpliciter with a daughter, his entering into marriage contract with her mother becomes unlawful, and the cohabitation with the mother makes the marriage contract with her daughter (from other husband) unlawful.

Maintenance :

Whether the marriage contract is valid or irregular, the maintenance of children, however, is incumbent upon the father. Indeed, in irregular marriage contract the maintenance of wife is incumbent only till the irregularity of the marriage contract has not been discovered but not after that. In view of the directive for getting the man and woman separated, and prohibiting cohabitation between them on discovery of the irregularity of marriage contract, the question of maintenance does not arise.

Children's Inheritance :

As the *ḥadd* punishment, on account of cohabitation-in-doubt, in irregular marriage contract lapses and the issues thereof are considered legitimate, they shall be considered as legal heirs of their parents and shall, according to law, get their shares in the legacy from both.

Term of Probation ('Iddat):

As the irregular marriage contract has the overall form of a marriage contract, in the event of separation or death of the husband, the observance of the term of probation (*'iddat*) becomes incumbent upon the woman, provided consummation of marriage has taken place. If consummation has not taken place, the observance of the term of probation (*'iddat*) is not

^{5a} *Al-Qur'ān, Surah Al-Nisā'*, (The Women), iv: 23,

”حرمت عليكم ... وربائكم الاتى فى حجوركم من نساءكم الاتى دخلتم بهن فان لم تكونوا دخلتم بهن فلا جناح عليكم“

^{5b} ”والعقد على البنات يحرم الاسماء. والد خول بالاسماء يحرم البنات“

incumbent upon the woman. The rule of observance of the term of probation in irregular marriage is not based on the marriage contract; it is rather based on the fact of consummation having taken place, making pregnancy probable.

In the event of separation, the observance of the term of probation shall begin from the time of separation effected between the couple by the *Qādī*, provided consummation has taken place. The same rule will apply in case of separation effected by the parties themselves.

The jurists, in irregular marriage contract, have used the word *Mutārikāt*, mutual relinquishment, instead of *talāq*, divorce. *Mutārikāt* means 'giving up each other mutually'. This is different from divorce. Hence in case of irregular marriage contract it is incumbent on each of the couple to effect separation between themselves.

On man's death, in the case of irregular marriage contract, the term of probation is not incumbent upon the woman unless consummation of marriage has taken place, after the defect is known.

Inheritance :

All the jurists are in agreement on the point that in case of an irregular marriage contract the couple do not inherit from each other.

Section 25. A void marriage contract is one which is intrinsically null and void.

Void marriage

Section 26. A void marriage contract is, in all respects, altogether ineffective. No conjugal rights or obligations between the parties ensue therefrom.

Effects of void marriage contract

COMMENTARY

Imām Muḥammad Al-Shaybānī has said about void marriage contract that it is, in its legal effects, void; that is to say, like a void contract for sale, no legal right or obligation, on its basis, is created⁶.

By *batil* is meant one the existence of which is like its non-existence, and therefore in a *batil* marriage neither paternity (*nasab*) is established, nor 'iddat is obligatory.

The grounds for marriage contract being void or unlawful are as follows :

- (i) Consanguinity.
- (ii) Fosterage.

⁶Al-Kāsānī, op. cit. vol. ii p. 247.

”والباطل من التصرفات الشرعية مالا حكم له شرعاً كالبيع الباطل“

- (iii) Affinity.
- (iv) Conjunction of two women within prohibited degrees of each other, if one of them is supposed by turns to be a man, as wives, in one man's marriage.
- (v) Infidelity, i.e. contracting marriage with an infidel man or woman.
- (vi) Pronouncing three divorces to one's own wife.
- (vii) Other's right, e.g. contracting marriage with another's wife.

Classification of Marriages in Books of *Fiqh* :

In Islamic jurisprudence marriages have been termed as valid (*ṣaḥīḥ*), irregular (*fāsid*) and void (*bātil*). In books of *fiqh* the words, "fāsid" (irregular) and *bātil* (void) appear to have been indiscriminately used. The question of invalid marriages has thereby become considerably confused. Marriages merely irregular have often been called void as well. Some of the examples of "fāsid" (irregular) marriages cited by the jurists confusingly have been termed by some as *bātil* (void) marriages. A number of the books on *fiqh*,⁷ however, lay down the following marriages as merely irregular :—

1. Marriage contracted without witnesses.
2. Marrying two sisters by a single marriage contract.
3. Marriage contracted with one sister after the other in spite of the knowledge of their relationship.
4. Marriages contracted with women prohibited by consanguinity, affinity and fosterage.
5. Marriage contracted by a Muslim male with a non-kitābiyyah.
6. Marriage contracted with a Muslim woman by an infidel who is the subject of a Muslim or an alien state.
7. Marriage contracted by a woman with a man under duress and without his consent.
8. Marriage contracted with a female during her period of probation (*'iddat*).

⁷ Ibn al-ʿĀbidīn : *Radd al-Muḥtār*, with *Al-Durr al-Mukhtār*, Maktabah Al-Saʿadah, Cairo, 1318 A.H., vol. ii Chapter "Al-Mahr", (Dower), p. 359; Mullā Miskīn : *Fatḥ al-Muʾīn*, (*Sharḥ Kanz al-Daqāʾiq*), Cairo, 1287 A.H. vol. ii, Chapter "Al-Mahr", (Dower), p. 60; Ibn al-Humām : *Fatḥ al-Qadīr*, Cairo, 1356 A.H., Vol. iii Chapter "Al-ʿIddat" (Waiting Period), p. 279; Dīmād Āfandī : *Majmaʿ al-Anḥur*, Dar al-Tabaʿat, Cairo, 1328 A.H. vol. i, Chapter "Al-Mahr", (Dower), p. 355; Ibn al-Nujaym : *Baḥr al-Rāʾiq*, Dar al-Kutub al-ʿArabiyyah, Cairo, 1311 A.H., vol. iii p. 111.

9. Marriage contracted unknowingly with a woman married to someone else.
10. Marriage contracted knowingly with a woman married to someone else.
11. Marriage contracted with a fifth woman inspite of four subsisting marriages.
12. Marriage contracted by a man with his wife's sister during period of probation, ('iddat) of his wife, who stands divorced by him.
13. Marriage contracted with one's own thrice divorced wife.
14. Marriage contracted collectively with women being among themselves within prohibited degrees by consanguinity or fosterage. That is, marriage contracted by a man with two women so related that if one of them be supposed to be a man marriage between them shall not be valid.

Of the marriage contracts, stated above, the following have also been termed as void :

1. In the event of marriage with two sisters contracted one after the other, the later one.⁸
2. Marriage contracted with women within prohibited degrees.⁹
3. Marriage of an infidel contracted with a Muslim woman.¹⁰
4. Marriage contracted knowingly with a woman married to someone else.¹¹
5. Marriage contracted with two sisters at one and the same time in one marriage contract, in respect of both of them.¹²

⁸Ibn al-Ābidīn : op. cit., vol. ii p. 392-93 Chapter on *Al-Muḥarramāt*, (The Women prohibited); Dāmād Āfrandī : op. cit., vol. i, p. 329; Ibn al-Nujaym ; op. cit., vol. iii p. 103; Ibn al-Humām : op. cit., vol. ii p. 362; Mullā Miskīn : op. cit., vol. ii p. 14.

⁹Ibn al-Ābidīn : op. cit. vol. ii p. 279.

¹⁰Al-Ḥaṣḥafī, 'Alā' al-Dīn : *Al-Durr al-Mukhiār*, on margin of *Radd Al-Muḥiār*, vol. ii, Chapter, *Thubū' al-Nasab* (Proof of Legitimacy), p. 650.

“نكح كافر مسلمة فولدت منه لا يثبت النسب منه ولا تجب العدة لانه نكاح باطل”

Also see Chapter, *Al-Mahr* (Dower), p. 359.

¹¹Ibn al-Humām : op. cit., vol. iii, Chapter *Iddat*, (Waiting Period), p. 279; Al-Ḥaṣḥafī : op. cit., vol. ii, Chapter *Iddat*, (Waiting Period), p. 631; Mullā Miskīn : op. cit. vol. ii, Chapter *Iddat*, p. 216;

¹²Ibn al-Nujaym : op. cit., vol. iv, Chapter *Iddat*, p. 151; Ibn al-Ābidīn : op. cit., vol. ii p. 294; Mullā Miskīn : op. cit., vol. ii p. 14.

In some books of *fiqh* the word 'void' has been used for the following :—

1. Marriage with woman within the prohibited degrees;
2. Marriage of an infidel with a Muslim woman;
3. Marriage with a woman knowing to be the wife of another; and
4. Marriage contracted by putting the man under duress.

Distinction between irregular and void marriages :

The words 'irregular' and 'void' have meanings different from each other. The question is whether the use of the two words in the above stated cases really signifies difference in their effects and consequences ?

So far as the definitions of an irregular marriage contract and a void marriage contract are concerned there is a marked difference between the two. An irregular marriage contract is one in which merely some condition of a valid marriage contract is missing; whereas a void marriage contract is one which is null and void *ab initio*. That is to say, it never got contracted. They differ in their effects and consequences as well.

In an irregular contract of marriage if co-habitation takes place the woman's dower, specified or proper, whichever is less, shall become due. In the event of divorce or death of the man the observance of the term of probation by the woman shall become incumbent. The issues that are born to them shall be legitimate. As against this, in 'void marriage contracts' no dower shall become due against the man, no observance of the term of probation shall become necessary for the woman and the issues born to them shall not be considered legitimate.

Shakh Ibn Human writes in his *Fath al-Qadir*^{12a} that the observance of the distinction between irregular and void in the matter of contracts for sale should be strictly construed because they concern property and property is not in *Shari'ah* venerable commodity. There is, however, no difference between irregular marriage contract and void marriage contract because marriage contracts concern uterus (human repository) and uterus is precious and venerable. According to him, therefore, all irregular marriage contracts entered into women of prohibited degrees are void. (Ibn Human's standard is very strictly laid down in cases of those women who are prohibited in marriage perpetually.)

Pakistan View :

The Hanafi Jurists have divided the marriages into three classes *Ṣaḥīḥ* (valid), "*fāsid*" (irregular or vicious and "*bātil*" (void) depending upon

^{12a} Al-Haskafī: Durr al-Mukhtār, 1324 A.H. vol. ii, p. 835, (see *Nikōḥ al-fāsid wal-bātil*).

their validity and effect. In case the marriage is free from all sorts of defects and infirmities, perfect in every respect and absolutely valid, it is called "*Ṣaḥīḥ*" It conforms with all the requirements laid down by the *Sharī'ah* of the marriage, e.g., the existence the proposal and acceptance, presence of the witnesses, a competency to contract, fitness of the subject of marriage (*maḥal*) and so forth. But a marriage in which there is a deviation, howsoever, trivial or slight, from the rules of *Sharī'ah* is not altogether nugatory. These defective marriages are classified into the two categories. In case the defect is of a radical and vital nature the marriage may be nugatory and void *ab inttio*. So to say, in the eye of law it is no marriage at all. It produces no results and in it the words of the proposal and acceptance were uttered in vain. Such a marriage is called "*bātil*" (void). However, in between the two is a third class of marriage; it is neither perfectly valid (*ṣaḥīḥ*) nor altogether void (*bātil*). In such a case the irregularity or defect in the marriage is not fatal to its existence and some of the consequences of a *Ṣaḥīḥ* marriage will be found to flow from it. A marriage of this kind is called "*fāsid*" (invalid, vicious and defective). The "*ṣaḥīḥ*" marriage shows that the quality of goodness or excellence exists in it, and not only the essence (*'ayn*) is good, but its quality (*waṣf*) is also good. However, in a *bātil* or void marriage the essence (*'ayn*) and the quality (*waṣf*) are both bad. But in a *fāsid* marriage although the essence (*'ayn*) is good, the defect lies in its quality (*waṣf*). A *bātil* marriage is unlawful in itself but in a *fāsid* marriage the unlawfulness consists in something else. (PLD 1968 Lah. 587 Sajjad Ahmed & Muhammad Akram JJ.).

Effects :

Before consummation a *fāsid* marriage, like a *bātil* marriage, is nugatory and has no effect. There is no '*iddat*' and dower in a *fāsid* marriage before consummation. But consummation in an invalid (*fāsid*) marriage does produce some results of a limited character. It becomes obligatory on the woman to observe '*iddat*'. She is entitled to the customary or the specified dower whichever is less and *nasab* (paternity) is established in case a child is born to them. There is no '*hadd*' (the specific punishment for *zinā*) in an invalid marriage, but the parties to it do not go unpunished for the offence committed by them. They are liable to be corrected by *ta'zīr* (a discretionary punishment) which may be extremely severe depending upon the circumstances of each case. The parties to an invalid marriage are under a liability to separate as soon as the *fāsid* (illegality) appears or becomes known to them. (PLD 1968 Lah. 587, Sajjad Ahmad Jan and Muhammad Akram JJ.).

Women with whom marriage is prohibited : There are in all 19 classes of women who are prohibited to a man and a marriage with them is unlawful

They are as under : (i) Mothers ; (ii) Daughters ; (iii) Sisters ; (iv) Father's sister ; (v) Mother's sister ; (vi) Brother's daughter ; (vii) Sister's daughter ; (viii) Foster-mother ; (ix) Foster-sister ; (x) Mother-in-law ; (xi) Wives's daughters (step-daughters) ; (xii) Son's wives ; (xiii) Father's wife (step-mother) ; (xiv) Two sisters in conjunction ; (xv) Married woman ; (xvi) Idolatress (Mushrikah) ; (xvii) One's thrice divorced wife ; (xviii) A woman in 'iddat (probation) ; (xix) More than four wives. In legal terminology they are generally called "*Muharramat*" (women forbidden in marriage). These prohibitions of the *nikāḥ* are of two kinds : perpetual and temporary. Broadly speaking the perpetual prohibition against the marriage arises on account of consanguinity (*nasab* or *qarabat*), fosterage (*riḍā'at*) and affinity (*muṣāhirat*). In these cases the prohibition is absolute and eternal. But the temporary or relative prohibition arises from some impediment in the way of the marriage which is not permanent in its nature and the obstacle is liable to be removed. Qaḍī Khan (Fatāwā, op. cit. Kitab al-Nikāḥ, pages 167—169), in the "Chapter on Muharramat" (Women forbidden to be married), has dilated upon this broad division into the two classes of women : *mu'abbadah* (permanently prohibited) and *ghair-mu'abbadah* (temporarily prohibited) women in marriages. In all there are the seven classes of women falling in this last category, "*ghair-mu'abbadah* (temporarily prohibited women). The interdict against the marriage with them is not perpetual. These temporary prohibitions are against (i) exceeding the number of wives allowed by law ; (ii) conjunction of two sisters ; (iii) conjunction of a free woman and a slave girl ; (iv) marriage with an idolatress ; (v) marriage with another's wife ; (vi) marriage with another's *mo'addah* (in the 'iddat of another) ; (vii) conjunction of two such females as could not have inter-married, if one of them was a male. (Sajjad Ahmad Jan & Muhammad Akram, JJ.) (*Ifikhar Nazir Ahmed Vs. Ghulam Kibria*: PLD 1968 Lah. 587).

Fitness of the Subject of Marriage (*Maḥal*) :

The contract of marriage (*nikāḥ*) is completed by a proposal and acceptance by the parties competent for it. It cannot be effected except by its constituents (pillars, *arkān*) emanating from an *ahal* (one who is competent to contract) and in reference to one who is *maḥal* (fitting subject) as in the case of other legal contracts. The *ahal* (person competent to contract marriage) is one who is *ahal* (competent) for all contracts. The *maḥal* is she who is a fit subjects for the effects of it. Similarly, the basic condition of marriage is competency (*ahliyat*) in the matter of sanity and majority and a *maḥal*, fitting subject (*maḥal*) and this *maḥal* is a woman to whose marriage there is no legal bar. In a valid (*ṣaḥīḥ*) marriage the husband is *ahal*, possessed of the capacity and the woman is *maḥal*, a fit subject to contract the marriage in accordance with the *shari'ah*.

According to the principles of Islamic Jurisprudence, there have been used two modes of expression relating to unlawfulness of a thing : either the thing is unlawful (*ḥarōm*) in itself, or it is unlawful (*ḥarōm*) because of something else, which is not inherent, but due to some cause related to that thing, at the relevant time, the thing has become unlawful. The first expression denotes the unlawfulness or the prohibition of a thing in itself, pertaining to the very essence (*nafs*), whereas the other expression denotes the prohibition due to and for something else, concerning the quality (*wasf*) of the thing. The result seems to be that in the first case the entire thing is void and in the other case it is only vitiated ; certain legal effects may ensue therefrom. To apply this rule to void, (*bōṭil*) and irregular, (*fāsīd*) marriages, a valid, (*saḥīḥ*) marriage is that which in its essence, (*nafs*) and quality, (*wasf*) both is good ; whereas in a void, (*bōṭil*) both the essence and quality are bad. But in an irregular, (*fāsīd*) marriage the essence is good but the quality is bad or lacking. Muslim jurists have linked the question of such a marriage with its consummation. If the man has not or could have no right at all in the woman, like a woman, who is perpetually prohibited to him on account of consanguinity, fosterage or affinity, the marriage is void intrinsically, in its essence. If the woman is prohibited due to some extrinsic quality, for something else which is extraneous, the marriage is irregular on consummation.

Doctrine of *Shubhah* (Doubt) :

There are, generally speaking, three kinds of *Shubhah*^{12b} (doubt) relating to carnal connection of man and woman :

- (i) *Shubhah fil Maḥal*—doubt in respect of the subject, the woman ;
- (ii) *Shubhah fil Fi'l*—Doubt in carnal conjunction in respect of the act itself ; and
- (iii) *Shubhah fil 'Aqd*—Doubt in respect of the contract (of marriage).

According to Ṣāhibayn (Abū Yūsuf and Muḥammad) the doubts are only of two kinds namely, the *Shubhah fil maḥal* and *Shubhah fil fi'l* ; the third kind i. e. *Shubhah fil 'Aqd*, as denominated by Abu Hanifah, is included in these two kinds of *shubhah*. To this writer as well, in view of the respective effects and consequences, the division of doubt into two classes appears to be correct, as held by several commentators. It is also stated by Ibn al-Humam in *Faṭḥ al-Qadīr* that *shubhan fil 'aqd* is included in *shubhah fil maḥal*, wherein parentage is established.

^{12b}Al-Ḥaskafī : op. cit. vol. ii, *Kitāb al-Ḥudūd*, Chapter, “Ḥadd on Cohabitation” :

“ الشبهة سالبه الشيء الثابت وليس بثابت في نفس الأمر ”

Distinction :

In the case of *shubhah fil maḥal* the doubt is based on some legal contention which is to negate the unlawfulness of cohabitation, though, in fact, it is not ; whereas in the case of *shubhah fil fi'l* the doubt need not be related to any legal contention ; it must, however, be asserted by the one who cohabited. (For example, to cohabit with a stranger woman presuming her to be his own wife, in a dark night, is the cohabitation in *shubhah fil fi'l*, whereas to cohabit with his own thrice divorced wife during her 'iddat is cohabitation in *shubhah fil maḥal*).

Effects :

There are also certain differences with respect to ensuing results of having carnal connection with the women in each kind of doubt. In the case of *shubhah fil maḥal*, the parentage of the child is established to the father, if he claims; whereas in the case of *shubhah fil fi'l*, the parentage is not established to the father, notwithstanding his claim, as the act is pure adultery. The other difference lies in the man's liability to pay the dower. In the case of *shubhah fil maḥal* the dower, fixed or proper whichever is less, is payable by the man to the woman; whereas in the case of *shubhah fil fi'l*, the dower is not generally incumbent on the man. Same is the case with 'iddat. If it is a case of *shubhah fil maḥal*, 'iddat on the woman shall be incumbent ; in the case of *shubhah fil fi'l*, it is not. However, in both the cases of doubt the *hadd* ¹²⁰ punishment is dropped, provided the man, in the case of *shubhah fil fi'l*, asserts that he believed in the lawfulness of the act of cohabitation; whereas in the case of *shubhah fil maḥal* the legality of cohabitation is based on some legal contention which, in fact, it is not so. It is also of little consequence, in the case of *shubhah fil maḥal* if the man asserts or

¹²⁰*Hadd*, pl. *hudūd*, in its primitive sense signifies obstruction, whence (obstructor), a gate-keeper is called *ḥaddōd*, prohibiting people from entering. It also means definitions as the term denote the essential limits of a certain thing or deed, by which it is distinguished. In law in its strict sense, it expresses the punishments, which have been prescribed by the holy Qur'ān. Later on, it also came to define the punishment, proved or established by the *sunnah* of the prophet, on which there is an *ijma'*. These punishments are : (1) For adultery, stoning (to death) in case the act is committed by married person ; (2) For fornication, a hundred stripes, when the act is committed by un married person ; (3) For falsely accusing a person with adultery, eighty stripes ; (4) For apostasy, death ; (5) For theft ; cutting of the right hand ; (6) For highway robbery the cutting of right hand and left foot ; (7) For robbery on the high way with murder, death, either by the sword or by crucifixation ; (8) For drinking wine, eighty stripes.

not, his supposition about the woman being lawful to him. There is yet another difference about inflicting *ḥadd* punishment to the man in case he contracts marriage with the woman who is permanently prohibited to him. According to Abū Ḥanīfah in such a case too, *ḥadd* punishment is dropped; only severe punishment or *taʿzīr* should be given, provided he knew of the unlawfulness at the time of marriage. According to Ṣaḥībāyṅ, if he knew of the prohibition, he will be awarded *ḥadd* punishment, otherwise *taʿzīr* will do. Rules relating to legitimacy of the children, dower, *ʿiddat* in both the situations, whether he knew of the prohibition or not, will not be applicable, as the prohibition is absolute according to the holy Qurʾān and admits of no ambiguity or difference of opinion about it.

Definition of Adultery (Zina) :

Adultery (*zina*) is a technical term used for an unlawful conjunction of man and woman, where penetration has taken place devoid of ownership (of uterus) in its entirety, either by right of marriage, or of bondage, either actual or erroneously supposed. Thus, when carnal connection is made under doubt about the property in the woman or under the erroneously supposed right it is not tantamount to *zinā* (adultery). *Hadd* punishment, in consequence thereof, is dropped according to a well known tradition of the holy prophet, “ادرؤ الحدود بالشبهات” Avoid the *ḥadd* punishments due to doubts”. It is also reported by Caliph ʿUmar that he said, “It is more desirable that I may drop *ḥadd* punishments due to doubt than that I may enforce them in doubt.” Ibn Hazm al-Zāhirī is, however, against the dropping of *ḥadd* punishment due to doubt, but his view, in presence of the tradition of the Prophet and the *āthār* (sayings) of his Companions, is not acceptable and should be ignored.

For better understanding and appreciation of the above analysis relating to the “Doctrine of Doubt”, it is deemed expedient to give herein below extracts in some detail with explanatory notes by the present writer in brackets, from two authentic books of *fiqh* : one is *Al-Hidayah* by Al-Marghīnani (d. 593 A.H.) and the other is *Al-Durr al-Mukhtār* by Al-Ḥaskafī (d. 1088 A.H.).

Al-Hidayah :

It is stated in *Kitāb Al-Hudud* of *Al-Hidayah*, Chapter “Cohabitation which makes the *ḥadd* obligatory and which does not make it obligatory”, that the cohabitation which makes the *ḥadd* obligatory is adultery. The meaning of adultery, both in lexicon as well as in *Shahrīʿah* signifies the carnal conjunction of a man with a woman in whom he has no right of ownership or a *quasi* ownership. That is why, adultery is prohibited and the unlawfulness is absolute. It is devoid of ownership, either by marriage or by

bondage, or by ownership-in-doubt in both the cases. The tradition of the Holy Prophet, "Avoid *ḥadd* punishments due to doubts" supports (the concept and practice of) avoiding *ḥadd* punishment (where cohabitation takes place in *quasi* ownership, whether by marriage or by bondage, or in doubt).

Kinds of doubt :

The doubts referred to are of two kinds : one is the "Doubt in the Act" (*Shubha fil fi'l* which is called *Shubhah Ishṭibāh*; and the other is the "Doubt in Subject" (*Shubha fil maḥal*) which is called *Shubhah Ḥukmiyyah*: (e.g. if a man in the dark of a night cohabits with a woman supposing her to be his wife, then, it is the case of doubt in the act; and if a man after pronouncing an irrevocable divorce to his wife cohabits with her during her waiting period (*'iddat*) believing her to be lawful to him, it is, then, a case of doubt in the subject). Thus, the doubt in the act is accepted in favour of a person who gets himself involved into it—that he mistook an illegal carnal conjunction for legal, because *ishṭibāh* signifies the man having sexual intercourse with a woman, under the supposition of the same being lawful to him : in consequence of his *supposing something other than that which was necessary to constitute legality* as affording an argument of such legality). It is, therefore, necessary that this doubt should have operated in his mind in order to establish *ishṭibāh*, misconception. The other kind of doubt i.e. doubt in the subject must, however, be based on some legal contention which may negate the unlawfulness of the act. That is, the argument of the legality of the carnal conjunction exists in itself, (yet practice cannot take place upon it because of some other accepted rule). For example, the Holy Prophet is reported to have said, "Thou and thy property is of thy father". Thus, if the father cohabits the female slave of his son, the *ḥadd* punishment will not be inflicted on him on account of his contention based on this tradition although the correct rule is otherwise. The doubt in the subject need not, however, be based on the supposition or belief of the person who commits the unlawful act of cohabitation.

Avoiding of Ḥadd punishment :

The *ḥadd* punishment is dropped in either of these species of doubt, because the tradition of the Holy Prophet, "Avoid *ḥadd* punishment due to doubt" is absolute and includes all sorts of doubts (i.e. the *ḥadd* punishment should be avoided due to any kind of doubt). But there is a difference in both the kinds of doubts in as much as in the case of "doubt in the subject" (*Shubhah fil maḥal*) the parentage of the child is established with the man who has had carnal connection with that woman, if claimed by him; whereas in the case of doubt in the act, ("*Shubhah fil fi'l*") the parentage shall not be established with the man, notwithstanding his claim. The reason is that in the case of "doubt in the act", the cohabitation is purely an act of adultery,

and the *ḥadd* punishment is dropped because of the fact that he made an assertion which is related to him personally that the act had become doubtful to him; whereas in the case of "doubt in the subject" (*Shubhah fil maḥal*) the cohabitation is not a pure act of adultery.

Cases relating to "Doubt in Act":

The "doubt in act" is generally found in the following eight situations :—

1. That a man cohabited with the female slave of his father, grandfather.
2. That a man cohabited with the female slave of his mother, or his maternal or parental grandmother.
3. That a man cohabited with the female slave of his wife.
4. That a man cohabited with his wife, after pronouncing three divorces to her, during her waiting period ('*iddat*).
5. That the man cohabited his wife, after pronouncing an irrevocable divorce to her for valuable consideration, during her waiting period ('*iddat*).
6. That a man cohabited with, after freeing his '*Umm walad*, (the female slave with whom her master co-habited and she gave birth to a child from him) during her waiting period ('*iddat*).
7. That a male slave cohabited with the female slave of his master.
8. That a mortgagee cohabited with the female slave who had been pledged with him.

Thus, in any of these eight situations (which, according to the present writer, are not exhaustive) if the person, who has had cohabitation, claims that he believed the female to be lawful to him, the *ḥadd* punishment will not be inflicted on him and if he stated that he knew of it that the female was unlawful to him, then the *ḥadd* punishment will be obligatory on him.

Cases relating to "Doubt in Subject".

There are six situations of "doubt in the subject" (*Shubhah fil maḥal*):—

1. That the man cohabited with the female slave of his son.
2. That the man cohabited with his wife after irrevocably divorcing her by implication (*talāq bil kinōyah*).
3. That a vendor committed cohabitation with his female slave sold to the vendee but before delivering her to him.
4. That the man who gave his female slave as dower to his wife, but cohabited with that female slave before her possession could be made over to his wife

5. That a man cohabited with a female slave who is the joint property of that man and of another.

6. That a mortgagee cohabited with the female slave mortgaged with him.

Thus, in all these situations (which, according to the present writer, are not exhaustive) *ḥadd* punishment will not be inflicted on him, even if the man stated that he knew about the unlawfulness of the woman to him.

“Doubt in the Contract” (of marriage) :

Further, according to Imām Abū Ḥanīfah “doubt” also gets established in the ‘*aqd* (contract of marriage) although the woman, according to the consensus of the ‘ulamā, is unlawful to him and the person who has had cohabitation with her himself knew of it. Barring Abū Ḥanīfah, according to the other jurists, doubt is not established by ‘*aqd* (contract of marriage), when the person who has had cohabitation knew himself that the contract of marriage was unlawful. (This difference of opinion between Imām Abū Ḥanīfah on the one hand and rest of the jurists on the other becomes apparent in the case of cohabitation with *mahārim*, women who are prohibited (in marriage *perpetually*)).

Illustrations :

If a man who pronounced three divorces to his wife and then cohabited with her during her ‘*iddat* and said that he knew of the woman being unlawful to him, he will be inflicted with *ḥadd* punishment, because the thing that could legalise the ownership (of uterus) had vanished and there was no occasion for doubt. The Holy Qur’ān clearly spoke of the absence of lawfulness of that woman to her (previous) husband and upon this, there is an *ijma*’ (consensus of jurists) and the contrary view will not be entertained as there is no difference about it. And if the person who has had cohabitation stated that he supposed that she was lawful to him, then, *ḥadd* punishment will not be inflicted on him, because there is the belief at its right place, (i.e. in the mind of the ex-husband) as the effect of the ownership of marriage is continuing in some respects. This is so, in as much as, if a child is born during her ‘*iddat* his *nasab* (parentage) shall be established with that man and it is prohibited for the woman to come out of her house during her ‘*iddat* and that (during ‘*iddat*) her maintenance is also obligatory on her husband. (Thus, his belief, for avoiding *ḥadd* punishment, will also hold good). And if an ‘*Umm walad* was freed by her master or the man gave *khula*’ to his wife or he pronounced divorce to his wife for valuable consideration and, thereafter, he cohabited with the woman during her ‘*iddat*, the same rule will apply to these cases as that of thrice divorced wife, (though her unlawfulness is established by ‘*ijma*, still some aspects of ownership are found present during ‘*iddat*).

If a man said to his wife, "thy matter is in thy hand", (that is, she was impliedly delegated the power of divorcing herself as and when she chooses), and the woman, then, exercised the said option. In such a situation, it will have the effect of a "divorce by implication". Thereafter, if the husband cohabited with her during 'iddat, and stated that he knew that she was unlawful to him, inspite of this, *ḥadd* punishment shall not be inflicted on him, because there is a difference of opinion among the Companions of the Holy Prophet (on the nature of the effectiveness of a "divorce by implication"). The rule of conduct of the Caliph 'Umar is that a divorce by implication is reversible and the same rule prevails in case of other implications. Likewise, if one intended, three divorces by implication,' then this also is a matter with difference of opinion about its effectiveness as such.

A man who cohabited with the female slave of his son or his grandson will not be inflicted *ḥadd* punishment, in spite of the fact that he stated that he knew that the woman was unlawful to him, because it is a *Shubhah ḥukmiyyah*, as it originates from a legal contention, which is based on the tradition of the Holy Prophet who is reported to have said, "Thou and thy property is of thy father". The parental right is also established for the grandfather (i.e. the same rule shall apply to grandfather and no *ḥadd* punishment will be obligatory on him), even in the lifetime of the father. The parentage of the child shall be established with the father and it will be obligatory on the father to pay the price of the female slave (to his son). And if a man committed cohabitation with the female slave of his father, mother or wife and stated that he believed her to be lawful to him, no *ḥadd* punishment will be inflicted on him. The person who accuses him of adultery will also not be liable to *ḥadd Qadhaf* (*ḥadd* punishment for slander as in fact, it is adultery), but the *ḥadd* punishment is dropped on account of the *Shubhah ḥukmiyyah* only (i. e. *Shubhah fil maḥal* : doubt in the subject) which has arisen out of a legal contention. And if he said that he knew of her unlawfulness to him, *ḥadd* punishment will be inflicted on him.

If a man cohabited with the female slave of his brother or uncle and said that he believed her to be lawful to him, he will be inflicted with *ḥadd* punishment because there is no mutuality of legal interest relating to property between him and his brother or uncle. The same rule will apply to the properties of other *Muḥārim* like maternal uncle and maternal aunt, except those with whom there is birth relationship like father and son, as supported by the tradition of Holy Prophet, referred to above, (i.e. there may be a legal scope for enjoying the properties of father and grandfather because of the affinity of birth and so there may be a doubt in un-lawfulness thereof, but as there is no such relationship with maternal uncle or aunt there cannot be any such enjoyment and thus there is no room for a doubt in unlawfulness).

If, after a marriage contract, a woman other than his wife was sent by the women to her husband on the first night, and the women said that she was his wife, and he then co-habited with her, there is no *ḥadd* punishment on him but he will be obliged to pay her dower, whatever be of the woman, co-habited with, as Caliph 'Ali ordered the man to pay the dower and asked the woman to observe 'iddat. In this case, there will be no *ḥadd* punishment because the man on the basis of the information given to him by the women fell in doubt in the subject because of the fact that there could not be a discrimination between his wife and a non-wife on the first occasion. Thus, the case of this person is like that of one who is deceived (i.e. like a person who is misrepresented to and defrauded by a woman that he may marry her although she was under the wedlock of some other person. He, then, married her and cohabited with her. In that case, he will not be inflicted with *ḥadd* punishment).

A person who found a woman on his bed and cohabited with her, *ḥadd* punishment will be obligatory on him, because there cannot be any doubt with respect to his wife after long association. His belief that he thought her to be his wife was not supported by any legal contention and so it was no doubt at all (in the eye of law). Similarly, if this man was blind even then *ḥadd* will be obligatory on him, because he could discriminate or identify by asking her (as to who she was) or by some other means. But if the case is such that the blind man invited the woman who was on his bed for cohabitation and she, accepting it, said that she was his wife and, then, he cohabited with her, in that case, there will be no *ḥadd* punishment because the nature of information to the blind man is now a contention (for dropping *ḥadd* punishment).

A man who entered into a marriage contract with a woman who is perpetually unlawful to him in as much as it is not lawful to marry her and then he cohabited with her, according to Imām Abū Ḥanīfah there will be no *ḥadd* punishment, even if he has committed the act after knowing the prohibition. (And this is the view of Sufyān Thawrī and Zufar also). And according to Imams Abu Yusuf, Muhammad and Al-Shafi'i (and also Imams Malik, Ahmad Bin Hanbal and other jurists) *ḥadd* punishment will be obligatory on him, provided he cohabited knowing the prohibition well, because this marriage has not been executed in regard to its proper subject (maḥal). It is, void; for, here the woman is not a proper subject of marriage, similar to a man marrying another man or boy, which is of no consequence. This is so because the proper subject of marriage, or of any other deed, is a thing which is (i.e. should be) a proper subject of the effects of such deed; now one of the effects of marriage is that its lawfulness be established, but as the woman is among those who are perpetually prohibited to that man, the contract of

marriage with her is consequently nugatory. The contention of Imām Abū Ḥanīfah is that the contract of marriage has taken place in regard to its proper subject, as a woman is the proper subject of marriage, because the proper subject of any deed is a thing which admits of the end intended being obtained from it; now (i.e. in as much as) the end of marriage is the procreation of children and to this all women in the progeny of Adam are subject. Thus, the marriage be taken to be constituted with respect to all its mandates (effects), but (except that) due to prohibition under the *Shari'ah* it did not give the benefit of its real lawfulness (the legalisation of progeny is not attained). Such being the case, doubt is occasioned, as doubt is a thing which has all attributes, though not the substance, of the fact which is to be established; and as, in this case, the man committed an offence for which the stated punishment, or *ḥadd* is not appointed, *ta'zīr* will be inflicted. But, according to *Al-Khulasah*, the verdict is on the averment of the Ṣaḥibayn. According to *Al-Muzmarāt* it is stated in *Jāmi' Al-Rumūz* that in the texts (*matūn*) of *fiqh* the verdict is on the formulation of Ṣaḥibayn, but the assertion of Imam Abu Ḥanīfah has been preferred in the Commentaries. Thus, it is stated in *Taṣḥīḥ Al-Qudūrī* that it is better to give verdict (*fatwa*) on the assertion of Abū Ḥanīfah. (To the present writer, the verdict (*fatwa*) given in the text-books of *fiqh* on Ṣaḥibayn is to be preferred as a general rule of interpretation. Anyhow, if the view of Imām Abū Ḥanīfah is preferred the *ta'zīr* in this case will be capital punishment, as is supported by a tradition narrated by Anas that his maternal uncle, Abu Burdah, was sent by the Prophet with a flag that he may bring to him the head of the person who had married the wife of his father). (Ref. *Al-Hidayah*, Qur'ān Mahal, Karachi, vol. ii, p. 513-16, Kitab al-Hudud; the explanatory notes written into brackets are of the present writer).

Al-Durr Al-Mukhtar :

There are three kinds of doubt (*Shubbah*) :—

(1) Doubt in the Subject (*Shubbah fil Maḥal*) which is also called “*Shubbah Hukmiyyah*,” (The term ‘*Hukmiyyah*’ here may mean “by legal implication” and the term *maḥal* signifies the woman (the subject) with whom the man has had cohabitation).

(2) Doubt in the Act (*Shubbah fil Fi'l*), which is also called “*Shubbah Ishtibah*,” i.e., there arises some doubt (*Ishtibah*) in the (legality of the) act of cohabitation (itself).

(3) Doubt in the Contract (*Shubbah fil Aqad*) (i.e., *Shubbah* of the contract of marriage).

The jurists, in general, have come to the conclusion that the third kind i.e. "the Doubt in the contract" (of marriage) is included in the first two kinds and is not a separate kind.

Doubt in the Subject (Mahal) :

There is no *ḥadd* punishment in case of 'doubt in the subject' (doubt in ownership i.e. title). In this case, the lawfulness of the subject (*mahal*, the woman) is established by legal implication (on the basis of an argument or contention which is put forth as nugatory to unlawfulness of that subject). It means that on account of the legal implication there may arise a doubt in favour of the ownership of (or title to) the person (*milk raqbah*) or the ownership of (title to) cohabitation (*milk waṭi*). Thus the *maḥal* (subject) has been construed as the subject of ownership (or title to) the person or to cohabitation although (specifically) for dropping *ḥadd* punishment. The real ownership in either the person or cohabitation is not established. There is no *ḥadd* punishment in case of doubt in *maḥal*, though the man may suppose it to be unlawful. (That is, the basis of the dropping of the *ḥadd* punishment consists of the legal contention (*Dalil Shar'i*) and not on the belief of the man, because on establishing the legal contention for dropping the *ḥadd* punishment the doubt is established in its reality, irrespective of the fact whether the man knew of the unlawfulness or not).

Illustrations :

There shall be no *ḥadd* in the following cases :—

(1) Cohabitation with the female slave of his son, howsoever low, although his son may be alive, on account of the Prophet's tradition, "thou and thy property is of thy father" (أنت و مالك لأبيك). It is stated by Ibn Majah that a man came to the Holy Prophet and said "O' the Prophet of Allah, I have indeed my property and there is my son, but my father asks for my property although he does not stand in need of my property." The Prophet (peace be upon him) replied, "Thou and thy property is of thy father". It becomes thus evident from this tradition that the property of a son is the property of his father. Then, that also implies doubt in unlawfulness of cohabitation by a man with the female slave of his son).

(2) A woman who is undergoing her waiting period ('*iddat*) of a 'divorce by implication' (*talaq bil kinayah*), or even if it is the '*iddat* of *Khula*' without valuable consideration in lieu thereof, notwithstanding the fact that he had intended of three divorces (by implication), because 'Umar (according to *Bahr*, 'Ali) is reported to have said, "the implications are reversible". (i.e. the divorce by implication is revocable; the man may take back his wife by word or deed. Thus, there is no *ḥadd* punishment in cohabiting with her; and in the case of *khula*' without valuable consideration in lieu thereof,

there is disagreement among the Companions of the Holy Prophet about its being *bā'in*, finally terminating the marital relationship by the man).

(3) There is also no *ḥadd* punishment in case of cohabitation by the vendor, with his female slave who has been sold but is yet to be delivered to the buyer and his wife's female slave who has been given to her towards her dower, but is yet to be delivered to her, and same is the case of cohabitation with one's own wife in an irregular (*fāsid*) marriage on her surrendering herself to her husband. In all these cases, *ḥadd* punishment is dropped.

(4) Similarly, there is no *ḥadd* punishment in cohabiting by one out of two partners with their joint female slave ; the cohabiting with the female slave of his *mukatab* or the female slave of the slave who has been permitted to trade, because in all these cases there is a plausibility of ownership and so the *ḥadd* is dropped.

(5) Same rule will apply to cohabitation with a female slave acquired in booty before or after bringing her to Dar al-Islam (before distribution of the booty) due to doubt in the ownership.

(6) There is no *ḥadd* in cohabiting with a female slave who has been purchased, before *istibra*, (the purification of the womb, the period of probation of one menses after the purchase of a female slave) and the cohabiting with a female slave in respect of whom there is the option for the buyer, and with a female slave who is the foster sister of the master.

(7) There is no *ḥadd* punishment on cohabiting with one's wife who has become unlawful to him due to apostasy, (*irtidād*); or she who surrendered herself to the son of her husband ; or the woman whose mother or daughter had been cohabited by her husband, because some Imams (Doctors of fiqh) do not consider such woman to have become unlawful to her husband due to his cohabiting with her mother or daughter.

Doubt in the Act (Fi'l) :

Similarly, there is no *ḥadd* punishment due to doubt in the act which is called *Shuhbah Ishṭibāh* i.e. doubt in favour of a person who got involved himself into doubt of lawfulness of the act. The *ḥadd* in case of doubt in fi'l (act) will be dropped if the man supposed the lawfulness of cohabitation. His mere assertion of that supposition will be relied upon, though, in fact, he did not suppose it. If either of the two alleged the supposed lawfulness, none of them will be inflicted with *ḥadd* punishment, unless both of them admit that they knew the act to be unlawful.

Illustrations :

There shall be no *ḥadd* in the following cases :—

(1) The co-habitation with the female slave of parents, howsoever high in degree, (because the affinity of relationship is enough to create a doubt in the mind of the man that she is lawful to him).

(2) The cohabitation with one's own wife divorced thrice at one and the same time, during her period of probation ('iddat). [Although the unlawfulness of thrice divorced wife is absolute, yet due to the continuity of certain mandates of *nikah* (marriage) like obligation of maintenance, restraint upon her to come out of her house and the proof of legitimacy of children during her 'iddat, there may arise a doubt about the lawfulness of the act. To the present writer, if three divorces are pronounced at a time, the co-habitation should be held to be a case of *Shubbah fil-maḥal* in as much as there is a difference of opinion between the four Imams and Imam Ibn Taymiyyah and his followers on the effectiveness of three divorces pronounced at in one sitting to be three) divorces. There should, however, remain no doubt in the subject, if three divorces have been pronounced at three clean periods. The cohabitation may then be deemed *shubhah fil fi'l* (doubt in the act) to avoid *ḥadd*].

(3) The cohabitation with the female slave of one's own wife. (Allah has stated about the Prophet in the Holy Qur'an : وَوَجَدَكَ عَائِلًا نَاعِلًا "And He found thee in need, and made thee independent" for his wife *Khadijah* being affluent), (Lxxxiii : 8) One may construe from this verse that a husband may use the property of his wife, and so there may arise a doubt about the lawfulness of that female slave. (To this writer, this case also falls within the scope of *Shubhah fil-maḥal* as the doubt seems to be based on a legal contention, though not correct).

(4) The cohabitation by a slave with a female slave of his master. (He, being in need of the property of his master, may suppose the lawfulness of his master's property to him. He being entirely dependant on his master may be excused.)

(5) The cohabitation by mortgagee with the female slave mortgaged with him. (This case, according to the present writer, also falls within the category of *Shubhah fil maḥal*, as there may arise a doubt in the ownership of the female slave on account of mortgage).

(6) The cohabitation with one's own wife divorced in lieu of property (for valuable consideration), during her period of probation ('iddat). Same is the case with *mukhtali'ah*, (one's own wife who has been granted *khula'* by him), during her period of probation ('iddat). The unlawfulness of *mukhtali'ah* is established by *ijma'* hence the *ḥadd* punishment will not be dropped, unless there is an allegation of her lawfulness, as some of the mandates of marital relationship still continue after the *khula'*.

Paternity :

The *nasab*, paternity of the child is established in *Shubhah fil maḥal*, provided the man claims the child, whereas in the case of *Shubhah fil fi'l* (doubt in the act) the paternity of the child is not established to him, notwithstanding his claim, as it is a case of pure fornication, except that in case of co-habitation with thrice divorced wife, *mukhtali'ah* and *mutallaqah* in lieu of property, during their periods of probation (*'iddat*) the parentage of the child shall be established with him without the condition of claim by him, as there is a doubt of the (continuance of) *'Aqd* (Contract) of marriage, which in the other cases of doubt in the act (*fi'l*) it is not. There is, however, an exception in case of cohabitation with a woman who was sent by the women who told him that she was his wife, although, in fact, she is not. In that case, the paternity shall be established with the man, provided he believed in the statement of those women and claimed the child.

Doubt in the Contract of Marriage (Shubhah fil 'Aqd) :

According to Imam Abu Hanifah there is also no *ḥadd* in the case of doubt in the *'aqd*, i.e. the marriage contract, e.g. cohabitation with a *mahramah*, (woman who is prohibited to him in marriage) whom he contracted into marriage. [Here, the word *mahramah* has been used unqualified which means and includes women prohibited in marriage on account of consanguinity, fosterage, affinity and other causes (*asbāb*)]. Although, according to Imam Abu Hanifah, there is no *ḥadd* punishment in case of doubt arising out of the contract of marriage, it is obligatory to inflict most severe punishment and grievous injury to the man if he was aware of the unlawfulness of the *mahōrim* (prohibited women); but according to Ṣahibayn there will be inflicted *ḥadd* punishment on him if he knew of the unlawfulness. In *Khulasah* there is the verdict on the opinion of Ṣahibayn. Shaykh Qasim has, however, stated in his Tashih that in all the Commentaries the opinion of Imam Abu Hanifah has been preferred and that to give verdict (*fatawa*) on his assertion is better. Yet, it is stated in Quhistani from *Al-Muzmarat* that in the texts (of *fiqh*) there is verdict (*fatwa*) on the assertion of Ṣahibayn. It seems that it is the *istidrak* (correcting mistake) of the assertion of Shaykh Qasim with regard to "all commentaries" as *Al-Muzmarat* is also a commentary. The statement regarding the assertion of the generality of the commentaries preferring the assertion of Abu Hanifah, however, seems to be prevailing). And it is stated in *Fath al-Qadir* that the *Shubhah fil 'aqd* is a species of the *Shubhah fil maḥal* and the paternity is established in it. For cohabitation in a marriage without witnesses there is no *ḥadd* punishment on account of doubt in the *'aqd*, contract of marriage. And it is in *Mujtaba* that a man married a woman who was *muhrim* (wearing pilgrim's dress, the state in which the pilgrim is held to be from the time one assumes the distinctive

garb until it is laid aside; in this state the pilgrim is forbidden to have connection with or kissing women) or a woman married to another person, or married his mu'taddah (having been divorced) during her period of probation ('iddah) and cohabited with her, under the supposition of lawfulness, no ḥadd punishment will be inflicted on him, but ta'zir will be obligatory. In case he cohabited after knowing them to be unlawful to him, there will again be no ḥadd, according to Abu Hanifah and there will be the ḥadd punishment according to the view of Sahibayn. It is thus apparent that the classification of Doubt into three namely, Shubhah fil Maḥal, Shubhah fil Fi'l and Shubhah fil 'Aqd—is only so according to Abu Hanifah. Allamah Halbi has stated that if the classification is made respecting its mandate, then, the doubt is only of two kinds, according to all, because some of the doubts in 'Aqd (Contract) are included in the Shubhah fil Fi'l (doubt in the Act) and some of them are included in the 'doubt in the subject' (maḥal). (*Al-Durr al-Mukhtar*, on the margin of *Radd al-Muḥtar*, vol. iii, p. 207-11, kitab *al-Hudūd*).

‘Allāmah Ibn ‘Abidīn, learned author of *Radd al Muḥtar* explaining the situation of maḥram, (*pl. maḥarim*), whom one has married, proceeds to say: “The author of the *Tanwīr-ul-Abṣār* has used the word ‘mahōrim’ generally (without any qualification), and therefore the word ‘mahōrim’ includes those women who are prohibited on account of *nasab*, or of *ridā‘*, or *Sihriyat*, and the author of the *Tanwīr-ul-Abṣār* suggests or implies that if the man marries the *mankūḥa* of another, or marries the mu'taddah of another, or marries his (own) thrice divorced wife, or marries a slave girl having a free wife, or marries a *majūsi* woman, or marries a slave girl without the permission of her owner, or if a male slave marries without the permission of his owner, or if a man marries five women by one (and the same) contract and has intercourse, or if a man joins two sisters in a contract of marriage and has sexual intercourse with both of them, or if he has sexual intercourse after marriage with the sister whom he married subsequently if the marriages have been one after the other; then in these cases there is no ḥadd. And this is by concurrence (of all three Imams) according to the most approved report. The reason for the absence of ḥadd according to Abū Ḥanīfah is clear; the reason for the absence of ḥadd according to Abū Yusuf and Muhammed is this: that, according to them, the doubt is removed only when the maḥram is one regarding whose unlawfulness there is concurrence and who is permanently unlawful”, (*Radd al-Muḥtar*, vol. iii, kitab *al-Hudūd*, p. 207-211).

Distinction :

From the above illustrations one is to see the basic distinction between the matrimonial connections which are unlawful in their own nature (*bāṭil* and void) from those which are unlawful on another account (*fōsid* or vicious).

A carnal connection between man and woman when there is no right of ownership (milk) in any shape or form, in the woman, either by marriage or bondage, is unlawful in itself and, therefore, *bātil*. The connection of a man with a woman who is not his property in any shape whatsoever, such as a stranger woman, is unlawful in its own nature; so also is his connection with a woman who is one with whom cohabitation is unlawful to him by a perpetual illegality, such as his foster sister. The perpetual illegality must, however, be universally admitted and established upon the authority of the sacred text of the Qur'ān, the most generally accepted traditions of the Prophet, or the *ijma'* of the 'Ummah: so as to be determined and known beyond all doubt or dispute. The marriage with such prohibited women will be *bātil*, irrespective of the fact whether cohabitation takes place or not. However, in case of marriages with women not perpetually prohibited the fact of cohabitation renders the marriage *fāsid*, (irregular) as to its effects and consequences.

A modern jurist, Allamah Abdur Raḥmān Al-Jazārī, in his work, *Kitāb al-fiqh 'Alal Madhōhib al-Arba'ah* (*Kitāb al-Nikōḥ*, vol. iv, page 116), has divided the *fāsid* marriage into two categories: One is that in which although the dower is obligatory but the *nasab* (paternity) is not established and 'iddat does not become obligatory. It is called as a *batil* marriage. In the other, some of the conditions necessary for a *sahih* marriage are missing, the *nasab* (paternity) is established, dower is payable and the 'iddat becomes obligatory. The learned author while making the above distinction, seems to have in mind the different effects of cohabitation due to 'doubt in the act' (*Shubḥah fil fi'l*) in the first case and cohabitation due to 'doubt in the subject' (*Shubḥah fil maḥal*) in the other.

Pakistan View :

From this discussion it follows that marriages with women who are permanently prohibited on account of *nasab* (consanguinity), *riqā'at* (fosterage) and *Sihriyat* (affinity) stand on a different footing. The term "maharim" (women prohibited in marriage) has a narrower connotation in this context. As stated in *Radd-al-Muhtār* according to the most approved report, the three Imāms are agreed that there is no *ḥadd* in case the man has established carnal connections *after marriage* with a woman prohibited to him, provided the prohibition was not perpetual but temporary and there is no consensus of opinion among the learned about its unlawfulness. This is because the doubt is removed only when the *maḥram* (prohibited woman) is one regarding whose unlawfulness there is concurrence among the learned, as in the case of a woman who is prohibited in perpetuity. It follows that it is permissible to allow the benefit of doubt in a case where the prohibition to the marriage is temporary or relative and the learned are divided in their opinion about its validity and legal effects. By consensus, under no

circumstances, the parties contracting such a marriage are liable to *ḥadd*. Such a marriage is considered as neither *ṣaḥīḥ* (valid), nor *bāṭil* (void) by the consensus of opinion and is deemed to be *fāsid*, (invalid and irregular). It is treated as not unlawful in its own nature but invalid for a different reason and on another account. (*Iftikhar Nazir Ahmad Vs. Ghulam Kibria* PLD 1968 Lah. 587, Sajjad Ahmad Jan and Muhammad Akram, JJ.).

Conclusion :

After due consideration of the matter the conclusion arrived at is that the marriage contract that contravenes the plain and established *naṣṣ* (textual manifestation) are all void. In some cases, (dealt with hereinafter), the rules of irregular marriage contracts apply when cohabitation has taken place in case of doubt in the subject of marriage (*maḥal*, the woman). The fact is that the rules of irregular marriage contracts that are applicable in such cases are not, in essence, the rules of marriage contracts. The jurists have framed these rules mainly because such cohabitation, being in pursuance of entering into the semblance of a marriage contract, is not adultery. The term adultery does not apply in such cases, because there is an element of doubt in the subject (*maḥal*, the woman) of such marriages. On this basis, inspite of the fulfilment of the obligation of dower, term of probation, '*iddat* and establishment of legitimacy, according to all the jurists, on the discovery of the defect in the irregular marriage contract, it is unlawful for the man to cohabit with her and for the woman to permit the man to do so. It becomes incumbent upon them to separate; otherwise the courts, in such case, shall get the man and the woman separated because the woman cannot be kept bound by such marriage contract under the *Shari'ah*. The Court may also award punishment (*ta'zīr*) in such a case. In other words, where the act of cohabitation is an act of adultery without any doubt in the act or the subject (*Shubḥah fil fi'l or fil maḥal*), and that there is no occasion of doubt in its being unlawful, factually as well as legally, the marriage contract shall be void and the rules of irregular marriage relating to *nasab* (paternity of children) and '*iddat* shall not be applicable. In case of cohabitation for doubt in the act, *nasab* shall again not be established, though proper dower and '*iddat* is obligatory, whereas in cases of cohabitation for doubt in the subject, if a marriage has gone through, the paternity of children will be established, if claimed, proper dower shall be paid to the woman and the observance of her period of probation, '*iddat* shall also be incumbent on her.

Modern Legislation Relating to Fasid & Batil Marriages :

Most of the Muslim countries have legislated on the subject of irregular (*fāsid*) and void (*bāṭil*) marriages, prohibited degrees of women and impediments to marriages, relevant provisions whereof are given below :—

Turkey and Cyprus :

Prohibited Degrees in Marriage : The Turkish Code lists those categories of relationship which constitute impediment to a marital union. These include blood relations in the direct line—brothers and sisters, full and consanguine; and uncles and nieces, aunts and nephews and also relations by marriage. The bar of fosterage is also specifically recognised. [Article 92 (1)]. Adoption, too, is mentioned as one of the impediments to marriage, although the legal fiction of adoption is unknown to Islamic jurisprudence. [Article 92 (3)]. Article 121 of the Code, however, provides that adoption ceases by the fact of marriage and that where a marriage takes place in violation of the bar of adoption, it cannot be declared void by the Court on that ground. While these two provisions of the Code conflict with each other, latter conforms to legal position of adoption in Islam as stated in the Holy Qur'ān. [Al-Qur'an, Surah *Al-Ahzāb* (The Confederates) xxxiii: 4, 37].

In Cyprus, under the Turkish Family (Marriage and Divorce) Law, 1951, prohibited degrees in marriage are the same as in Turkey with the following two differences :—

- (i) neither fosterage nor adoption is mentioned by the Law of Cyprus as a bar to marriage (Section 7); and
- (ii) that marriage of a Muslim woman with a non-Muslim man is prohibited. [Section 7 (1-C)].

Nullity of Marriage: A marriage shall be void under the Turkish Civil Code in the following circumstances:—

- (i) if either party has a spouse living at the time of marriage;
- (ii) if either spouse is, at the time of marriage, insane or if his or her judgement is affected by some permanent calamity; and
- (iii) if the marriage is within prohibited degrees. (Article 112).

Under the Turkish Family Law of Cyprus, a marriage shall be void, in addition to the above three grounds, if the bridegroom is a non-Muslim; or if a girl below the age of eighteen years marries without her guardian's consent, provided that in the latter case it cannot be nullified if the girl had, after the marriage, completed her eighteenth year or has become pregnant or if the guardian has ratified the marriage. (Section 19). In Turkey as well as Cyprus, any party interested in a marriage which is void may apply to the Court for a declaration of nullity.

Voidable Marriages : The Turkish Code specifies certain grounds on which the Court may, on the application of either spouse, declare a marriage invalid. All these grounds represent the cases in which consent of the

aggrieved party has not been free. The grounds are enumerated in Articles 115 to 120 summarised below :—

- (a) that at the time of marriage the aggrieved party's judgement was affected by reason of some temporary cause;
- (b) that such party did not in fact intend to contract a marriage or particularly to marry the other party but did so under a bonafide mistake;
- (c) that such party contracted the marriage under a bonafide belief that the other party possessed certain qualities absence of which would make the marital life intolerable;
- (d) that such party was wilfully deceived about the moral character of the other party either by the latter or by a third person;
- (e) that the other party is suffering from a disease, which was concealed from the aggrieved party, endangering the latter's health or that of the children; and
- (f) that the aggrieved party was induced to marry by threats of a grave and imminent danger to life, health or honour of his or her own or of such party's close relations.

Similar provisions are found in the Turkish Family Law of Cyprus. (Section 20).

Issues of a marriage annulled by the Court : In Turkey as well as in Cyprus, when a Court annuls a void or a voidable marriage, so far as the legitimacy of the issues from that marriage is concerned, it shall be presumed that it has been dissolved by a decree of divorce. (The Turkish Civil Code, Article 125; The Turkish Family Law of Cyprus, Section 22).

Jordan :

Irregular & Void Marriages : Article 29 of the Jordanian Law lists only two circumstances in which a marriage shall be void (bātil), namely, when it violates the bar of affinity or when it is a marriage of a Muslim girl with a non-Muslim man. As regards other marriages considered void by the traditional Hanafī law, e.g., one within the forbidden degrees of blood-relationship or fosterage, the Jordanian Law is silent. The provision of Article 29 cannot, however, be regarded as exhaustive. As provided by Article 130, the uncodified Hanafī law relating to the aforementioned bars to a valid marriage will continue to apply.

Relevant provisions of Jordanian Law relating to irregular and void marriages are as follows :—

Art. 28. A marriage, parties to which are not competent to contract, or which is solemnized without the presence of witnesses or contracted under duress, or which violates the rule of 'unlawful conjunction', or the

female party to which is observing 'iddat, or which is a mut ah (a temporary marriage), shall be irregular (fāsid).

Art. 29. A marriage within the prohibited degrees of affinity and that of a Muslim woman with a non-Muslim man shall be void (bātil).

Art. 30. An allegation as to irregularity of a marriage based on the age of any party thereto cannot be heard by the Qāḍī where the wife has already a child or pregnancy has become apparent, or if the conditions relating to the age laid down in article 4 stand complied with, at the time the action is brought to Qāḍī.

Art. 33. After receiving her prompt dower (mahr al-mu'ajjal) the wife is bound to live in her husband's house and to travel with him to another place if desired by him, unless there is any legal impediment. Where it is feared that in doing so the husband intends to injure her, or if he cannot be trusted with her, such a fact shall constitute a real impediment within the meaning of this article.

Art. 37. A void or an irregular marriage, if not consummated, shall have no legal effects whatsoever.

Art. 38. If an irregular marriage is consummated, rights and obligations as to dower, 'iddat, legitimacy of children and the bar of affinity shall be established but not the other effects of a valid marriage.

Art. 39. A void or irregular marriage shall not be allowed to continue and if it is not dissolved by the parties the Qāḍī may dissolve it in the interest of morality.

Syria :

Rights of wife under an Irregular Marriage : The Syrian law recognises the Ḥanafī distinction between a void (bātil) and an irregular (fāsid) marriage, the former being absolutely invalid and the latter being invalid due to a reason which can be lawfully removed. An irregular marriage does not give, to the wife under the Ḥanafī law, the right to maintenance after knowing the irregularity. On this subject the Syrian law provides that if a wife is unaware of the fact that her marriage is irregular she shall be entitled to maintenance so long as she remains so unaware. [Article 51 (3)].

The relevant provisions of Syrian law relating to two kinds of marriages and their effects are as under:

Art. 47. Where all the elements of a marriage-contract are present and all the conditions for its solemnization have been fulfilled the marriage shall be valid.

Art. 48. Marriage of a Muslim woman with a non-Muslim man shall

Art. 50. A void marriage shall not have any of the effects of a valid marriage, even if consummated.

Art. 51. (1) An irregular marriage, if not consummated, shall be like a void marriage ;

2. If it is consummated it shall give rise to the following :—

- (a) the proper or the specified dower whichever is less,
- (b) legitimacy of children with its effects laid down in article 133 of this Law,
- (c) bar of affinity, and
- (d) 'iddat of divorce if the husband pronounces a divorce or dies, and maintenance during 'iddat, but not mutual rights to inheritance.

3. The wife shall be entitled to maintenance so long as she is unaware of the marriage being irregular.

Art. 66. The wife must, after receiving her prompt dower, reside with her husband.

Art. 67. The husband cannot accommodate with his wife in one and the same house a co-wife without the former's permission.

Art. 68. In case of plurality of wives, the husband must treat them equally in respect of residence. (Syrian law of Personal Status, 1953).

Tunisia :

Invalid Marriages : Besides a bigamous marriage, the following marriages have also been held as invalid (fâsid) under the Tunisian Law :

- (a) a marriage without the consent of either spouse. (Article 3).
- (b) a marriage contracted before attaining puberty or to which there is any other legal impediment. (Article 5).
- (c) a marriage within any of the prohibited degrees. (Articles 15 to 17).
- (d) a marriage with a woman observing 'iddat. (Article 20).
- (e) a marriage with a condition which is contrary to the essence of the marriage contract. (Article 21).

An invalid marriage shall be compulsorily annulled. If such a marriage takes place and is consummated, it will give rise to the wife's right to dower and obligation of 'iddat, and also to legitimacy of children and bar of affinity, but not to mutual rights of inheritance between the spouses. (Article 22).

The relevant provision of Tunisian law relating to impediments to marriage and invalid marriages and their effects are as under:—

Art. 14. There are two kinds of impediments to marriage : permanent and temporary. Permanent impediments are: blood relationship, affinity, fosterage, and triple-divorce. Temporary impediments are: marriage of the woman with another person under 'iddat.

Art. 16. Women prohibited because of affinity are wife's ascendants, irrespective of consummation of marriage with her, her descendants, if the marriage with her has been consummated, and wives of one's ascendants and descendants, howsoever remote, irrespective of the consummation of the marriage concerned.

Art. 17. Relations prohibited by fosterage are the same as under the preceding two articles. The foster-child shall, in particular, to the exclusion of his collaterals, be considered the child of the foster-mother and her husband. Fosterage occurring after the age of two years shall not constitute any impediment to marriage.

Art. 18. Plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or for a fine of 2,40,000 francs, or to both, if the second marriage is in violation of any requirements of this law.

Art. 19. Marriage of a man with a triply-divorced wife is forbidden.

Art. 20. Marriage with a woman married to another person or observing 'iddat for him is prohibited.

Art. 21. An invalid marriage is one which involves a condition contrary to the essence of a marriage-contract, or which is in contravention of articles 3, 5, 15, 16, 17, 18, 19, and 20 of this Code.

Art. 22. An invalid (fāsid) marriage shall be compulsorily annulled without a divorce. The marriage-contract in itself shall have no legal effect. If such a marriage is consummated, the following effects only will follow :—

- (a) the right of woman to the specified dower,
- (b) legitimacy of children,
- (c) obligation of 'iddat from the date of separation, and
- (d) the bar of affinity.

Analysis:

A close examination of the various provisions of the laws relating to irregular and void marriages as in force in various countries of the Muslim World reveals the following :—

- (i) *Adoption as an impediment:* In Turkey, adoption, too, is mentioned as one of the impediments to marriage, although the legal fiction of adoption is unknown to Islamic Law. [(Article 92 (3).]
- (ii) *Polygamous marriage being void:* Under the Turkish Family Law of Cyprus, a marriage shall be void if either party has a spouse living at the time of marriage (Article 12). It, too, includes a polygamous marriage. This is against the spirit of the Holy Qur'ān, the Sunnah, the Ijma' and the entire corpus juris of Islamic Shari'ah.

Unlike many other Muslim countries, Tunisia and Turkey are the only Muslim countries where polygamy is totally banned. This is against the spirit of Islam. Other Muslim countries have allowed polygamy but have put some restrictions on it, having due regard to the policy of *Shari'ah*.

- (iii) *Legitimacy of issues in void marriage:* It has been provided in the Turkish Civil Code as well as the Turkish Family Law of Cyprus that when a court annuls a void or a voidable marriage, so far as the legitimacy of the issues from that marriage is concerned, it shall be presumed that the marriage has been dissolved by a decree of divorce. It means that the issues have been legitimised irrespective of the fact that the voidance might have ensued from the prohibition caused by consanguinity, affinity or fosterage. So far as the legitimisation of issues from a fasid or irregular marriage is concerned, it is not against the traditional *Shari'ah* Law, but the legitimization of children from a void marriage on account of absolute prohibition caused by consanguinity, affinity and fosterage is questionable. The Qur'anic text as laid down in Surah Al-Nisa, (The Women), iv: 22, 23 may well be quoted against the law enacted in Turkey and Cyprus.

Under the Tunisian Law, a marriage within any of the prohibited degrees has been held to be *fāsīd*. If such a marriage is consummated, it will give rise to legitimacy of children (Article 15 to 17 and 22). This provision of law does not make any distinction between *fāsīd* and *bātil* marriages nor the question of one's having knowledge of prohibition at the time of marriage has been taken into account.

- (iv) *Marriage with thrice divorced wife:* In respect of a husband's freedom to remarry a woman whom he has divorced thrice finally, the Moroccan law significantly differs from the Tunisian Law. Unlike Tunisia, the law in Morocco specifically recognises the traditional Islamic principle under which a third divorce operates as a bar to remarriage, which can be removed only through the procedure

of undergoing an 'intervening marriage' as prescribed by the Holy Qur'ān and the Sunnah. The law in Tunisia in this respect is not in consonance with the injunctions of the Holy Qur'ān and the *Sunnah*, in as much as the procedure of the intervening marriage does not find any place in the Tunisian law.

- (v) *Stipulations in a marriage contract* : The Iraqi law authorises the parties to an intended marriage to stipulate any lawful conditions in a marriage-contract. If the husband violates a condition so stipulated, the wife can seek dissolution of her marriage by the Court. [(Article 6 (3) & (4)].

In Iranian Code too it is provided that the parties to an intended marriage may incorporate, in the deed of marriage, any lawful stipulations. So long as any such stipulation is not opposed to the very purpose of marriage, it shall be enforceable by the courts. (Article 4).

Article 38 of the Moroccan Code too, provides that if a marriage contract is coupled with a condition which is opposed to the *Sharī'ah* (the essence of the marital contract) the marriage shall be valid and the condition inoperative. It specifically adds that a condition to the effect of wife's freedom to work in national interest shall not be invalid.

Under Tunisian law as well the parties to an intended marriage may agree to incorporate any stipulations in their marriage-contract; violation of such a stipulation shall be a ground for the dissolution of marriage and if it occurs after the consummation of marriage it shall also entitle the aggrieved party to compensation to be paid by the party who is guilty of violation. (Article 11).

The Syrian law, however, deals at greater length than the other Muslim countries with the right of parties to an intended marriage to stipulate conditions in the marriage contract. It permits any stipulation which is not opposed to the nature and purpose of the marriage contract and does not violate the *Sharī'ah*. It is further provided that if a marriage-contract is coupled with such a condition, the marriage shall be operative but the condition shall have no effect. [(Article 14 (1)]. It is further specified that a stipulation for the wife's benefit which, although not forbidden by the *Sharī'ah*, affects the legal rights of the husband cannot itself be enforced, but the wife may demand dissolution of her marriage if the husband violates such a stipulation. [(Article 14 (2)].

Section 27. Marriage contract with one's own mother, daughter, sister, father's sister, mother's sister, brother's daughter and sister's daughter, howsoever high or low in degree, is unlawful and void.

Marriage with
mother, daughter

COMMENTARY

It was customary among the infidel Arabs that after the death of the father his wives were considered as lagacy and his sons established conjugal relationship with them. Islam sternly forbade this abominable practice through the Qur'ānic verse, "And marry not women whom your father married, except what is past: It was shameful and odious,—an abominable custom indeed."¹³ The marriage contracts with all such women who had ever remained in marriage with their father, howsoever high in degree, were made unlawful to them.

Allāh by ordaining "Prohibited to you (for marriage) are: Your mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters,"¹⁴ has made marriage absolutely unlawful, on the ground of consanguinity with (such as, mothers, daughters, sisters, father's sisters, mother's sisters, brother's daughters, sister's daughters) ascendants as well as descendants and real relations of other kinds like brothers, sisters, their issues and father's brothers, mother's brothers, father's sisters and mother's sisters of howsoever high or low in degree.¹⁵

Section 28. Marriage contract with one's own foster mother or sister is unlawful and void.

Marriage with
foster mother
and sister

COMMENTARY

In Islamic law, a marriage contract is unlawful because of relationship by consanguinity as well as by fosterage. Under the Qur'ānic verse, "Prohibited to you (for marriage) are...your foster mothers (who gave you suck) and your foster sisters,"¹⁶ marriage contract with foster mother and sister has been totally forbidden.

¹³ *Al-Qur'an, Surah Al-Nisā*, (The women), iv: 22.

”ولا تنكحوا ما نكح آبؤكم من النساء الا ما قد سلف، انه كان فاحشة ومقتاً وساء سبيلاً“

¹⁴ *Al-Qur'an, Surah Al-Nisā* (The women) iv:23.

”حرمت عليكم امهاتكم وبناتكم واخوانكم وعماتكم وذلاتكم وبنات الاخ وبنات الاخت“

Al-Haskafī op. cit. p. 284; Ibn al-Humām, op. cit. p. 357.

¹⁵ Al-Nasafī, op. cit. p. 97; Al-Qudūrī, op. cit. p. 147; *Fatāwā al-Ālamgirīyyah*, op. cit. p. 4; Haskafī, op. cit. p. 285; Ibn Al-Humām: op. cit. p. 357; *Ibn al-Najaym*; op. cit. p. 99-100.

¹⁶ *Al-Qur'ān, Surāh Al-Nisa*, (The Women), iv: 23,

”حرمت عليكم...امهاتكم الاتى ارضعنكم واخوانكم من الرضاعة“

In general, the principle is that as a marriage is unlawful on the ground of consanguinity likewise a marriage is unlawful on the ground of fosterage.¹⁷

All those relatives of a wet nurse who are for marriage purposes unlawful for her children are also unlawful for all those who have been suckled at her breast. Consequently, the children who have been suckled by the same wet nurse become foster brothers and sisters to each other and marriage contract among them becomes unlawful. Marriage contract on account of fosterage is, however, not unlawful with the following women:—

1. Foster mother of the full sister.
2. Mother of the foster sister.

There are three types of such mothers:—

- (a) Foster mother of the full sister of the boy not nursed at the foster mother's breast.
- (b) Mother-in-law of the foster sister of the boy not nursed at the mother-in-law's breast.
- (c) Other foster mother of the foster sister of the boy.

3. Full sister of the foster brother.
4. Full sister of the foster son.

According to *Sunnīs*, the father of a boy (by nasab) can contract marriage with wet nurse of the boy and with the mother or daughter of the wet nurse of the boy. Marriage contract with the wet nurse of the uncle and aunt is also valid.¹⁸

Fosterage Conditions :

According to *Hanafīs*, the sucking of milk even once establishes the relationship of fosterage ; and in effect works as bar to a marriage contract.¹⁹ According to *Shāfi'īs*, sucking of milk a minimum of five times is the condition.²⁰ According to *Shi'ahs* the fosterage can act as legal

¹⁷It is on the basis of the tradition of the Holy Prophet :

“ يحرّم من الرضاع كما يحرّم من النسب ”

Al-Ḥaṣḥafī: op. cit. p. 284; Ibn al-Humām: op. cit. p. 357; Ibn al-Nujaym: op. cit. vol. iii p. 239 and 244.

¹⁸Amīr 'Alī: *Jamī'al Ahkām fi fiqh al-Islam*, p. 72; Ibn al-Nujaym: op. cit. vol. ii p. 344, 559; Al-Ḥaṣḥafī: op. cit. vol. ii p. 416; Ibn al-Humām: op. cit. vol. iii, pp. 8-10; Dāmād Āfandī : op. cit. vol. i. pp. 375-76.

¹⁹Al-Qudūrī : op. cit. p. 155; Dāmād Āfandī : op. cit. vol. i p. 375; Ibn al-Ābidīn: op. cit. vol. ii. p. 415; Ibn al-Humām: op. cit. vol. iii. p. 2.

²⁰Al-Qudūrī : op. cit. p. 155; Dāmād Āfandī : op. cit. vol. i p. 375; Ibn al-Ābidīn: op. cit. vol. ii. p. 415; Ibn al-Humām: op. cit. vol. iii. p. 2.

bar only when one has sucked milk fifteen times or has sucked at least for a day and a night.²¹ For the fosterage acting as bar to marriage it is necessary that the age of the child at the time of its sucking milk of the foster mother, according to *Sahibayn* (Imām Abū Yusuf and Imam Muḥammad) is upto two years and according to Abū Ḥanīfah upto two and half years.²² The averment of Ṣāhibayn has received the verdict of *fugaha*, on this question, and the same should be acted upon. Thus, if a child above two years of age is suckled the prohibition of fosterage shall not apply.²³

The second fosterage condition is that the age of the foster mother be nine years or more; otherwise the fosterage prohibition shall not apply.²⁴ For a girl below nine years of age suckling is a freak of nature and as such does not create the prohibition of fosterage. The reason for the same is that no girl can attain majority before reaching the age of nine years. If she is able to suckle before reaching the age of nine years, it is in reality some unnatural secretion as does sometime appear even in a man. Another reason of the same is that a girl attains majority legally at least at the age of nine years. Before attaining the age of nine years she is not accountable under *Sharī'ah* law. The prohibition, on account of fosterage, is a bar created by Sharī'ah law. Since a girl of less than nine years is not accountable under Sharī'ah, the suckling will not establish the bar of fosterage.

Generally, the fosterage prohibition becomes applicable in case of suckling direct from the breast. Even milk having been obtained from the breast and served to one orally shall establish fosterage prohibition.²⁵ If a mother's milk is mixed with that of cow, buffalo or goat prohibition of fosterage shall be established only in case it forms major part of the mixture²⁶. If the woman's milk having been mixed with something else is cooked and the form is changed altogether and a child eats it up, the fosterage prohibition shall not apply, in as much as it is hardly fosterage.²⁷

²¹Al-Ḥillī: op. cit. p. 176.

²²Ibn al-Humām: op. cit. p. 5; Ibn al-ʿĀbidīn: op. cit. vol. ii. p. 413.

²³Al-Qudūrī: op. cit. p. 155; Ibn al-Humām: op. cit. p. 5; Ibn al-ʿĀbidīn: op. cit. p. 413.

²⁴Ibn al-Humām: op. cit. vol. iii. p. 15; Ibn al-ʿĀbidīn: op. cit. vol. ii. p. 419.

²⁵Qāḍī *Kh*ān: op. cit. p. 191; Ibn al-ʿĀbidīn: op. cit. p. 413; Ibn al-Humām: op. cit. p. 114.

²⁶Qāḍī *Kh*ān: op. cit. p. 191; Ibn al-ʿĀbidīn: op. cit. p. 420; Ibn al-Humām: op. cit. p. 12.

²⁷Al-Kāsānī: op. cit. *Kitāb al-Raḍāʾa*; Ibn al-ʿĀbidīn: *ibid*; Ibn al-Humām: *ibid*.

Prophets' Tradition :

It is stated in *Ṣaḥīḥ al-Bukhārī* that 'Aqbah b. Hārith said that after he married the daughter of Abu Wahab b. Aziz, a woman came to him and said that she had fostered 'Aqbah and the woman with whom he ('Aqbah) had married. 'Aqbah said "I do not know if you have fostered me; and neither you ever informed me of it." Then 'Aqbah went riding from Mecca to Medina to the Prophet and presented his problem to him. The Prophet said, "How may you now cohabit with your wife when it has been so stated to you." Consequently 'Aqbah separated her from himself and she married another man.²⁸

Effects of Fosterage :

If unknowingly a man and a woman contract themselves into marriage, whose marriage is prohibited, on account of fosterage, separation becomes incumbent upon them, as soon as they come to know of it. If they do not separate on their own account, it will be the duty of the Qāḍī to get them separated because the illegality of the marriage contract having become known they cannot continue to live as husband and wife. If they separate before consummation, the wife shall not be entitled to have any claim whatsoever against the husband. If they separate after it, the wife shall be entitled to get proper dower, if no dower has been fixed. In the event of the dower having been fixed she shall be entitled to get the fixed dower or the proper dower, whichever be less. The marriage contract being held fāsid on account of consummation, due to ignorance, the maintenance of the wife during the observance of her term of probation ('iddat) shall not be incumbent upon the husband.²⁹

Section 29. It is unlawful for a man to contract marriage with his mother-in-law. The marriage, if so contracted, will be unlawful and void.

Marriage with
mother-in-law.

COMMENTARY

Under the Qur'ānic verse, "Prohibited to you (for marriage) are..... your wives' mother"³⁰ the marriage contract with the mother or grand mother, howsoever high in degree, of the wife is unlawful³⁰.

²⁸Ibn al-Hajar 'Asqalānī: *Fath al-Bārī* commentary on *Ṣaḥīḥ al-Bukhārī*, Cairo, 1959, p. 194; Al-Haskafī, op. cit. Chapter on *Al-Maharramāt*, (The prohibited women), p. 284.

²⁹Umar Abdullah: *Al-Aḥkām al-Ṣarī'ah al-Islāmiyyah fil Aḥwāl-al-Ṣakhsiyyah*, Egypt, p. 159.

³⁰*Al-Qur'ān*, *Sūrah Al-Nisā*, (The Women), iv: 23,

”حرمت عليكم... امهات نساءكم“

^{30a}Al-Qudūrī; op. cit. p. 147; Al-Nasafī; op. cit. *Kitāb al-Nikāh*, p. 98.

Basis of the Rule:

The principle is that contracting marriage with the ascendants of one's wife or husband, on account of their own marriage, is unlawful. Hence, the wife's mother, maternal grandmother and paternal grandmother, may they be full or half and of howsoever high in degree, are unlawful to the husband. Likewise the marriage contract with the husband's ascendants is unlawful to the wife.

It is necessary here to make it clear that the prohibition against contracting marriage with the wife's issues applies in case of consummation of marriage with her. That is to say, the intercourse with the wife must have taken place. If she is divorced before intercourse the marriage contract with her issues would be valid. But the prohibition of marriage contract with the wife's mother, maternal grandmother, paternal grandmother and others is unconditional and absolute. After the marriage contract, intercourse with wife may or may not have taken place, the sanctity of affinity shall be established and marriage can never be contracted with her ascendants. Even if marriage with the wife does not remain intact the prohibition against her ascendants will continue.³¹ Same is the case with the wife's contracting marriage with the father and grandfather of her husband.

Section 30. The contracting of marriage by a man with his step-daughter, born of the wife with whom he has cohabited, is unlawful and void.

Marriage with
step daughter

COMMENTARY

Under the Qur'ānic injunction "Prohibited to you (for marriage) are..... your step daughters under your guardianship born of your wives to whom ye have gone in--no prohibition if you have not gone in--³²" contracting marriage with those step-daughters who are born of the wives with whom one has cohabited are unlawful. If there is no cohabitation with the wife and she is divorced or dies before consummation, marriage contract with her step daughter is not forbidden.³³ Mere valid retirement, in this context, is not synonymous with cohabitation.³⁴

³¹*Fatawa Alamgiriyyah*: op. cit. *Kitāb al-Nikah*; Ibn al-Ābidīn & Al-Ḥaṣḥafī: op. cit. vol. ii. p. 286; Ibn al-Humām: op. cit. vol. ii. p. 358; Damād Āfandī: op. cit. vol. i, p. 323; Mālik: *Muwattā*: op. cit. p. 442-43.

³²*Al-Qur'ān, Sūrah Al-Nisā*, (The Women), iv: 23,

”حرمت عليكم... ربائكم اللاتي في حجوركم من نسائكم اللاتي دخلتم بهن، فان لم تكونوا دخلتم بهن فلا جناح عليكم“

³³Al-Qudūri: op. cit. p. 98; Al-Nasafī: op. cit. p. 98.

³⁴*Fatāwā Ālamgiriyyah*, vol. ii *Kitāb al-Nikah*, p. 4.

Basis of the Rule :

The principle is that contract of marriage with the progeny of the husband or wife, after cohabitation, is unlawful. Consequently the contracting of marriage with the daughter of the wife or the daughter of the son of the wife of howsoever low in degree or with the daughter of the maternal grandson or paternal grandson is unlawful. Likewise, the contracting of marriage with the husband's progeny whether they be real or step and of howsoever low in degree, is unlawful, provided cohabitation with the women has already taken place; if not, the prohibition of affinity will not apply.

Section 31. The contracting of marriage by a man with the wife of his own son is unlawful and void.

Marriage with
son's wife

COMMENTARY

Under the Qur'ānic injunction, "Prohibited to you (for marriage) are..... those who have been wives of your sons proceeding from your loins³⁵", contracting marriage with the wives of sons, paternal or maternal grandsons, of howsoever low in degree, is unlawful, whether or not the sons have cohabited with their wives. If, however, they be adopted sons contracting marriage with their wives (after divorce by or death of the husbands) is not unlawful.³⁶

Section 32. Marriage contracted by a Muslim with another sister, one sister being already in his wedlock, is unlawful.

Conjunction
of sisters

Explanation: Marriage contract with the sister of the wife after the wife's death or on the elapse of the period of probation, in the event of she being divorced, is lawful.

Exception: If a man, inspite of one sister being in his wedlock, unknowingly marries another sister and cohabits with her in doubt, the rules relating to irregular marriage contracts shall apply. The irregularity having become known, separation becomes incumbent upon them. If they do not effect separation themselves, the court will effect separation between them and will have the power to inflict punishment upon them.

³⁵ *Al-Qur'ān, Surah Al-Nisa, (The Women), iv: 23,*

“حرمت عليكم .. حلائل ابناءكم الذين من اصلايكم”

³⁶ *Al-Qudūrī: op. cit. p. 98.*

^{36a} *Fatawa Alamgiriyyah, op. cit. vol. ii. p. 4; Al Ḥaṣḥafī: op. cit. vol. ii, p. 284; Ibn al-Humām: op. cit. vol. ii, p. 358-60; Damād Āfandī: op. cit. vol. i p. 323-24.*

COMMENTARY

To keep in wedlock two sisters at the same time is prohibited by the Qur'ānic verse, "Prohibited to you (for marriage) are.....two sisters in wedlock at one and the same time.³⁷" In face of this clear mandate it is unlawful, in case of a sister being in one's wedlock, to wed her other sister.

Jurists' Opinions :

Imām Rāzī, in connection with the conjunction of two sisters as wives, writes in his Commentary on the holy Qur'an that the phrase with reference to the context really means, "حرمت عليكم الجمع بين الاختين"³⁸ i.e. it has been made unlawful for you that you keep two sisters in your marriage at one and the same time. Imām al-Kāsānī, the author of "Bada'i al-Ṣanā'i" has also expressed himself to the same effect. There is consensus of opinion, he says, on the point of prohibition of conjunction of sisters in one man's marriage contract as the words of Allah, "ان تجمعوها بين الاختين" are in conjunction with His words "حرمت عليكم امهاتكم" that "He prohibited to you (for marriage).....your mothers....." The reason for the same is that it creates bad blood between very closely related women. If the marriage contract of two sisters is performed collectively with a man, it will be void with respect to both of them. If the marriage contract is performed with them one after the other, the first marriage will be valid and the other will be void.⁴⁰ If the two sisters are married separately and it cannot be determined as to who was married first, separation of both of them from their husband shall be effected.⁴¹ "Muḥīṭ" of Sarakhsī lays down that of the marriages with two sisters, if contracted one after the other, the latter one shall be irregular. But Imam Sarakhsī in his other book, *Al-Mabsūṭ* by stating "فان محرم بالنص الجمع الاختين" holds the conjunction of two sisters absolutely unlawful by virtue of the Qur'ānic text.⁴²

³⁷Al-Sarakhsī: op. cit. vol. iv. p. 195-96.

³⁸Al-Rāzī: *Tafsīr Al-Kabīr*, vol. iii, p. 182.

³⁹Al-Kāsānī: op. cit. vol. ii, p. 262.

"منقول لاختلاف في ان الجمع بين الاختين في النكاح حرام بقوله تعالى و "ان تجمعوها بين الاختين" معطوفاً على قوله عز وجل "حرمت عليكم امهاتكم" ولان الجمع بينهما يفضي الى قطيعة الرحم -"

⁴⁰Qādī Khān: *Fatāwā* op. cit. p. 168. Ibn al-Ābidīn: op. cit. vol. ii, p. 293 Damād Āfandī: op. cit. vol. i, p. 325.

⁴¹Al-Nasafī: op. cit. p. 98 :

"ولو تزوج اختين في عقدتين ولم يدرا الاول فرق بينهما وبينهما -"

Ibn al-Ābidīn ; op. cit. vol. ii, p. 293 ; Dāmād Āfandī op. cit. vol. i p. 325.

⁴²*Fatāwā Ālamgiriyyah* : op. cit. vol. ii, *Kitāb al-Nikāḥ*, p. 6.

Ibn Humam has stated in his book *Fatḥ al-Qadīr*, commentary of *al-Hidayah*, that some jurists have also used the term “*fasid*”, irregular for “void (*batil*) marriage contracts. Hence, contrary to the contract of sale, there is no distinction between the term “void” and “irregular” in the matter of marriage contract.”⁴³ For example in the following expression,—

”واذا تزوج الحر خمساً على التعاقب جاز النكاح الرابع الاول ولا يجوز نكاح الخامسة
وان تزوج خمساً فى عقدة فسد نكاح الكل“

“And when a free man contracts five marriages one after the other, the first four contracts of marriages are valid and the fifth contract of marriage is not valid. And if he contracts all the five marriages by one stipulation of contract at one and the same time, all the five marriages stand vitiated (*faṣada*), as used by Qādī Khan,⁴⁴ the word “*fasada*”, means “*Batala*”, termed as void.

Modern View :

Modern commentators of Islamic Law have expressed different views on this question. Qādī Pashā of Egypt has stated that, in the event of two sisters being contracted into marriage by one marriage-contract, the marriage contract of both shall be void. If two sisters, one after the other, are married with a man, the marriage contract of the first will be valid and that of the other will be void.⁴⁵ Sir Abdul Raḥīm, in case of conjunction of two sisters in one man’s marriage, quoting Radd al-Muḥtār, appears to be in favour of holding the second one’s marriage “irregular”. He writes, “Marriage between persons who are permanently prohibited from intermarrying is *bātil* or void, such as with a man’s own sister or the like, and a

⁴³Ibn al-Humām: op. cit. vol. ii p. 382.

⁴⁴Qādī Khan: *Fatāwā*, Matba Mustafā’ī, India, p. 168.

⁴⁵Abdul Raḥmān, Nawāb: *Institutes of Musalman’s Law* p. 80-81. (This work is the translation of Arabic text of Qādī Pashā’s *Al-Aḥkām al-Sharī‘ah fil Aḥwāl al-Shakhsiyyah*, published in Egypt in 1895, which is the second attempt at the codification of Islamic Laws, mostly confined to Personal Law. The first work of codification is *Al-Mujalla al-Aḥkām al-Adliyyah*, prepared by a Committee of Experts appointed by Sultan Abdul Hamid II of Turkey, in 1869-1876. Thereafter have followed a number of attempts to codify the laws of Islam: See author’s article on Codification of Islamic Laws in Muslim Countries, published in *Pakistan Legal Decisions*, Lahore 1967 Volume I Journal Section, p. 46. The present writer’s work “*Majmu‘ah Qawānīn Islam*” in Urdu language and the present work is the first attempt at codification of Islamic laws in English in the Indo-Pak sub-continent.

marriage between persons whose disability to intermarry is for a temporary cause, such as marriage of a woman during her 'iddat or marriage in violation of condition requiring the presence of two witnesses is *fāsid* or vitiated".⁴⁶

Saksena writes, "The bar of unlawful conjunction renders a marriage irregular, not void."⁴⁷ Syed Amir Ali too holds such marriage irregular. He says, "If such a marriage is contracted, in fact, it is invalid (*fasid*) and not void (*bōṭil*), for the prior marriage may become dissolved at any time by the death or divorce of one of them and thus validate the other union".⁴⁸ Mulla and Tayebji have also held that such marriages are irregular.

Indo-Pakistan View :

These views of the commentators and writers had their effect on judicial decisions and it appears that the Indo-Pakistan Courts held two different views on this point. One view is that such a marriage is void and the issues therefrom are illegitimate, consequently not entitled to any inheritance. The second view is that such a marriage is irregular. The issues thereof are legitimate, entitled to inherit and the wife after consummation is also entitled to dower (specified or proper, whichever is less).

The first case, in this respect, is "*Sharifunnisa* versus *Khizrunnisa*" of Saddar Diwani 'Adalat, Calcutta⁴⁹ in which the marriage contract of the second sister has been held to be void. In a later case "*Azizunnisa* versus *Karimunnisa* Calcutta High Court has held that such marriage contract was null and void.⁵⁰ But Bombay High Court in its decision of the case, *Tajuddin* versus *Mawla Khan*⁵¹ differed from the decision of Calcutta High Court and finding the second marriage merely irregular held that the issues therefrom were legitimate and entitled to inherit from their parents. Thereafter, the High Courts of Madras, Lahore and the Chief Court of Oudh, in such cases, followed the ruling of Bombay High Court.⁵²

Analysis :

If these rulings be considered minutely it would become clear that the Calcutta High Court attached importance to the Qur'anic verse, "Prohibited

⁴⁶Abdul Rahim Muhammadan Jurisprudence, Lahore, 1963, p. 330.

⁴⁷The Muslim Law, p. 219.

⁴⁸Muhammad Law, V. Ed. Chapter VII p. 280.

⁴⁹Sadar Diwani 'Adālat Reports, p. 210.

⁵⁰(41) (1895) I.L.R. 41 Cal. 130.

⁵¹(42) (1904) I.L.R. 41 Bom. 485.

⁵²*Ata Muhammad V. Saiqal Bibi*, 7 I.C. 820 ; *Tali Muhammad V. Muhammad Din*, I.L.R. 12, Lah. 52 ; *Kaniza V. Hasan Ahmed Khan*, A.I.R. 1826, Oudh 230.

to you (for marriage) are.....two sisters in wedlock at one and the same time”⁵³ and to the early works of *fiqh* while the Bombay High Court, in this respect, relied upon a passage of *Muḥīṭ* in *Fatāwā ‘Ālamgīrī*⁵⁴ and the writings of Baillie and Syed Amīr‘Alī.

The real reason of considering the marriage with the other sister void or irregular by modern commentators is that they, while examining the question of the validity or invalidity of marriage, got involved in other connected matters such as adultery, its punishment, dower, period of probation, maintenance and legitimacy of children. On this account, the real question whether the marriage was void or irregular received confusing treatment. Undoubtedly these matters are inter-related, but it does not mean that the real question about the validity or invalidity of the marriage should have been given a secondary place.

Further, most of the modern commentators of Islamic Law while dealing with “prohibitions of marriage,” have been carried away more with the causes on account of which those prohibitions arise than with the specific nature of prohibition. The point of view of most of the commentators, therefore, is that, on account of permanent prohibition on the ground of affinity, fosterage and marriage, the contract of marriage becomes void. Other grounds of prohibition are temporary and may be removed at any time. Therefore, according to them the conjunction of two sisters in one marriage, keeping of more than four women at a time in marriage, contracting marriage with idolatress or with one married to another person is merely irregular, and not void.⁵⁵

The legal prohibitions to marriage contracts arise due to several causes. The kind and nature of prohibitions are determined according to the form of

⁵³*Al-Qur’an*, Surah Al-Nisā, iv: 23,

” حرمت عليكم . ان تجمعوا بين الاختين “

⁵⁴If two(real) sisters were married by two contracts of marriages, the latter’s marriage shall be invalid (or irregular) i.e. *fāsid* and it shall be incumbent upon them to separate. If such marriage comes to the knowledge of the Qāḍī (judge) he shall effect separation between them. If the man separated her before cohabitation no provision of law shall be invoked but if he separated her after cohabitation she shall get the settled dower or the proper dower whichever be less. The woman shall also observe the period of probation. If she be pregnant, the paternity shall be established and the man shall have to remain aloof from his wife, till her sister’s ‘iddat expires. (*Muḥīṭ* ref. in *Fatāwā ‘Ālamgīriyyah*, Maktaba Rahimiyyah, Dewband, volume ii, Kitāb al-Nikāḥ p. 6):

⁵⁵Syed Amir Ali : op. cit. Chapter vii, p. 331.

those causes. If the cause be of permanent and everlasting nature the prohibition to marriage contract too would be permanent. If the cause be of temporary nature the prohibition to marriage contract would also be of a temporary nature. But so far as the legal prohibitions to marriage contracts are concerned there is no difference, with respect to its immediate legal effects, of the prohibition being permanent, non-permanent, everlasting or temporary. Consequently the marriage contract can be validated only if the cause of prohibition is removed. Merely an expectation or possibility that the prohibition against the marriage shall at any time be removed, (for instance in the event of the conjunction of two sisters at a time if one dies or is divorced) to hold such marriage contract irregular instead of void amounts to defying the plain biddings of the Qur'ān.

Moreover, the prohibition of the conjunction of two sisters in a marriage has also been stated in the same Qur'ānic verse in which the prohibitions on the grounds of affinity, fosterage and consanguinity have been laid down. The prohibition against conjunction has been laid down because of the sanctity of marriages and kinships. Hence, before contracting marriage with the other sister the matrimonial cause of prohibition should be or have been removed (i.e. either the first married sister be divorced or be dead). The marriage contracted with the other sister, thereafter, shall be valid, otherwise it shall be void.⁵⁶ However, if the man, on the basis of doubt, cohabits with the other sister, her dower would become due on him and the observance of a term of probation on separation would become incumbent upon her. If there is an issue from this kind of union it would be legitimate. The separation between them, however, has got to be effected. Till the term of probation of the said second separated sister is not completed, it would not be lawful for the man to cohabit with the sister under his wedlock.⁵⁷

Under Islamic Law not only the conjunction of two sisters in one marriage is forbidden but, according to Ḥanafīs, if one sister having been divorced either revocably or otherwise, the marriage contract with the other sister, during the term of probation of the first sister, is also invalid. However, according to Shafi'īs, after an irrevocable divorce, without waiting for the completion of the term of probation, marriage with the other sister may be contracted.⁵⁸

⁵⁶*Fatāwā 'Ālamgiriyyah*: op. cit. p. 6 :

”وتحريم الجمع بين الأختين ومن في معناهما“

⁵⁷*Al-Kāsānī*: op. cit. vol. ii p. 263.

⁵⁸*Fatāwā 'Ālamgiriyyah*: op. cit. vol. ii p. 7; Hamilton: *Hedaya* (Eng. Trans.) op. cit. p. 30; *Hedayah*, Qur'an Mahal, *Kitāb al-Nikān* p. 309-10; *Al-Quduri* : op. cit. p. 148; *Nasafi*: op. cit. p. 98:

”وحرّم تزوج أخت معتدة“

Section 33. A marriage contract made simultaneously or consecutively with two such inter-related women whose inter-marriage, in the event of one being supposed a man becomes invalid, is unlawful.

Conjunction in marriage of inter-related women

COMMENTARY

In legal terminology marriage contract with two women who are so inter-related with each other that if one of them be a man marriage contract between them would be unlawful is called "unlawful conjunction". Consequently it is unlawful for a man to conjoin in his marriage a niece and her father's sister or a niece and her mother's sister.⁵⁹

Prophet's Command :

It is stated in a tradition from the Prophet, "No one should conjoin (in marriage) his wife and her father's sister or his wife and her mother's sister".⁶⁰ Imām Mālik also holds this view and has narrated a tradition from the Prophet, "It is narrated by Abū Hurayrah that the Prophet has said that father's sister and brother's daughter or mother's sister and sister's daughter are not to be conjoined (in marriage)". Besides, it is narrated through Sa'īd b. al-Musyyib. "It is forbidden for one to contract marriage with his wife's brother's daughter so long as his marriage relationship with his wife continues and for one to contract marriage with his wife's sister's daughter so long as his marriage relationship with his wife continues."⁶¹

⁵⁹Ibid :

” بين امرأتين اية فرضت ذكراً حرم النكاح “

Dāmād Āfandi: op. cit. vol. i p. 325; Ibn al-Abidīn: op. cit. vol. ii. p. 391-92.

⁶⁰Muhammad: Muwattā, Karkhana Tejarat-i-Kutub, Kar. p. 239;

” عن ابي هريرة ان النبي صلى الله عليه وسلم قال لا يجمع الرجل بين المرأة وعمتها ولا بين المرأة وخالتها “- ” اخبرنا مالك اخبرنا يحيى بن سعيد انه سمع سعيد بن المسيب ينهى ان ينكح المرأة على عمتها او على خالتها - “

Mustafa Al-Sabba'i: *Sharḥ al-Qanūn al-Ahwāl al-Ḍakhsiyyah*, Syria, Sec. 39 p. 114.

” لا يجوز الجمع بين امرأتين لو فرضت كل منهما ذكراً حرمت عليه الاخرى “-

⁶¹Mālik: *Muwatta*, op. cit. p. 442:

” عن ابي هريرة ان رسول الله صلى الله عليه وسلم قال لا يجمع بين المرأة وعمتها ولا بين المرأة وخالتها - “

” عن سعيد بن المسيب انه كان يقول ينهى ان ينكح المرأة على عمتها او على خالتها وان يطأ الرجل وليدة وفي يطئها جنتين لغيره - “

Principle of Law :

The principle formulated, in the light of these traditions, is: "Of the two women if one is supposed to be a man and marriage between them on account of consanguinity or fosterage be not valid, their conjunction in one man's marriage shall be invalid".⁶² Conjunction in marriage of a woman and her previous husband's daughter from another wife is however, valid,⁶³ because if the woman is supposed to be a man, the daughter would be a stranger to her and a marriage contract between them would be valid.

Conculsion :

If the two such inter-related women are married to a man at the same time both marriages shall be void. If they are married one after the other, the first one shall be valid and the second would be void.

Modern commentators on Islamic law are inclined to regard such marriages as "irregular" for unlawful conjunction. But in the light of the traditions stated above such a marriage being prohibited should be held to be void, because the Prophets' command respecting the prohibition is express and peremptory. If the marriage is contracted in spite of the knowledge, according to the view of *Ṣāhibayn* (Imām Abū Yūsūf and Muḥammad Al-Shaybānī.) *Hadd* shall be imposed upon him.⁶⁴ In the absence of knowledge, the marriage contract, if consummated, shall however, be governed by the rules of "Irregular Marriage" due to doubt in the act or the subject, as the case may be.

Section 34. Marriage contracted knowingly of a Muslim male with a female married to another person is unlawful.

Marriage contract with a female married to another

Provided that in case of consummation of such a marriage contracted unknowingly with a female married to another person, the marriage contract shall be considered irregular and that the defect having become known separation shall become incumbent upon the parties. If the parties do not separate of themselves, the Court shall get them separated and shall have power to impose punishment upon them.

⁶²Fatāwā 'Ālamgīriyyah, op. cit. vol. ii p. 7.

⁶³Al-Qudūrī : op. cit. p. 148:

”ولا بائس بان يجمع امرأة وابنة زوج كان لها من قبل -“

Ibn al-Ābidīn: op. cit. vol. ii p. 292.

Dāmād 'Āfandī: op. cit. vol. i p. 326.

⁶⁴Ibn al-Humām : op. cit. vol. iii, *Kitab al-Hudūd* (Prescribed Punishments).

COMMENTARY

Contracting marriage with a female married to another person has been prohibited in the Holy Qur'an, where it is laid down, "Also (prohibited) are women already married except those whom your right hands possess."⁶⁵

View of Imam Razi :

Imām Rāzī has written in his commentary on the Holy Qur'an that the word "والمحصنت" is governed by the words, "حرمت عليكم" in the same manner as the word "امهاتكم" is governed by "حرمت عليكم". In other words, contracting marriage with another's wife is, in the opinion of Imām Rāzī, as unlawful as contracting marriage with one's own mother.

View of the Four Imams :

There is no difference of opinion among the *a'immah Arba'ah* (the founders of four schools of Sunni Law) on the point that the female who is to be contracted into marriage with a male must be free from any other contract of marriage, i.e. she must not be under the marriage contract of someone else. It is essential for a female to be a fit subject (*maḥal*) at the time of marriage contract. If she is married to some one else, she cannot be a fit person for marriage with another. Moreover, when she is under marital obligations to one husband such rights cannot be created in another's favour against her. It is, thus, not legally possible for both the husbands to exercise similar rights over one female at the same time.⁶⁶ Consequently, marrying another's wife is unlawful.⁶⁷

Pakistan Law :

Under the current law in force, (Sec. 494 Pakistan Penal Code,) if a female, having her husband living, marries another person she commits the offence of bigamy.

⁶⁵*Al-Qur'ān*, Surah Al-Nisā; (The Women), iv: 24,

”والمحصنت من النساء الا ما مملكت ايما نكم“

⁶⁶Ibn al-ʿĀbidīn: *Radd al-Muḥtār*, vol. ii Chapter on 'Iddat p. 624 :

”منكودة الغير فمبى غير محل اولاً يمكن اجتماع ملكين فى آن واحد على شىء واحد فالعقد لم يؤثر ملكاً فاسداً“

⁶⁷*Fatāwā ʿĀlamgīriyyah*: vol. ii p. 7 :

”ولا يجوز للرجل ان يتزوج زوجة غيره“

Qanūn al-Aḥwāl al-ʿakḥsiyyah, Sec. 38 :

”ولا يجوز التزوج بزوجة الآخر“

Al-Aḥkām al-Ṣharʿiyyah fil Aḥwāl al-ʿakḥsiyyah, Egypt. Sec: 27 :

”يحرم نكاح زوجة الغير“

In the case of "*Liaquat Ali vs. Karimunnisa*"⁶⁸ it was held that if a married Muslim woman marries another person during coverture such second marriage would be void and the issue thereof shall be illegitimate.

Exception :

There is, in this respect, one exception : If the marriage is contracted without knowledge of the fact that the female is the wife of another person and the male cohabits with her, in such circumstances, on the basis of cohabitation, but not on the basis of marriage itself, the connubial relationship shall be governed by the rules of "Irregular Marriage" which, in fact, are the rules governing cohabitation-in-doubt. All Muslim jurists, on this account are unanimous in their view that the parties, as soon as they come to know of the illegality, must separate. If they do not separate of themselves, the court shall get them separated.

Section 35. The fifth marriage contracted by a Muslim male during subsistence of his four marriages is void, except that in case of cohabitation in doubt the rules relating to an irregular marriage shall be applicable.

Fifth Marriage
in presence of
four

COMMENTARY

Under Islamic law a Muslim male is allowed to have more than one wife at the same time limited however to four, whether they be contracted into marriage one by one or at a time. This permission has been given under the Holy Qur'ān itself, "Marry women of your choice, two or three or four..."⁶⁹ There is, alongwith it, another direction as well, "But if you fear that you shall not be able to deal justly with them, then, only one..."⁷⁰

Prophet's Mandate :

All the Doctors of Muslim Law are unanimous on the point that it is permitted in Islam to have four wives at a time. In other words, it is forbidden to have more than four wives at a time. Accordingly, a tradition on the matter is reported from the holy Prophet: Ibn Shihāb Zuhrij said that he learnt that the Prophet (peace be upon him) said to a person belonging to the tribe of Thaqif having ten wives, "Keep four wives and leave the rest."⁷¹ This happened after the people of the tribe of Thaqif had embraced Islam.

⁶⁸I L.R. 15, Allahabad, p. 396.

⁶⁹*Al-Qur'ān*, Surah Al-Nisā, '(The Women), iv: 3,

"فانكحوا ما طاب لكم من النساء مثنى وثلاث وربع"

⁷⁰Ibid:

"فان خفتهم الاتعداوا فواحدة"

⁷¹Imām Muḥammad : Muwatta, Karkhana Tijarat Kutub, Karachi, p. 240 :

"اخبرنا ابن شهاب قال بلغنا ان رسول الله صلى الله عليه وسلم قال لرجل من ثقيف

وكان عنده عشر نساء حين اسلم الثقيفي فقال له اسسك ستهن اربعاً وفارق سائرهن"

Jurists' View :

It is said in "*Fatawa Qādī Khan*", "If a free Muslim male contracts marriages with five females one after the other (and keeps all the five at a time in his marriage) the first four marriage contracts are valid and the fifth one is invalid (*fāsid*). If he contracts marriages with the five females at the same time, all the five marriages shall consequently be *fāsid*.⁷² The term, "*fāsid*" has in fact been used here in the meaning of the term, "*bātil*." Hence all the five marriages shall be void, (*bātil*) Qādri Pasha of Egypt writes that prior to the divorce of one of the four wives and the completion of her term of probation the marriage contract with a fifth female is void.⁷³

As against this, Baillie and Amīr 'Alī maintain that the fifth marriage contract is irregular. The prohibition, in their view, is a relative one, which may, at anytime, be removed by divorce or death of one of the four wives. With the removal of the prohibition the irregularity of the marriage contract shall disappear and it shall become valid *ab initio*.⁷⁴ Mulla, too, following Baillie and Amīr 'Alī, maintains the fifth marriage contract to be irregular.⁷⁵ Tayebji and Saksena as well, following Baillie and Amīr 'Alī, assert that the fifth marriage contract is irregular.

Analysis :

Baillie and Amīr 'Alī have, in fact, enunciated a formula to distinguish between *fāsid* and *bātil* marriages viz. that of a permanent and a temporary prohibition, applying to the marriage in question, which has already been dealt with under the discussion of 'conjunction of sisters in marriage'. The view point of Baillie and Amīr 'Alī, if accepted as correct, would render the relative prohibitions meaningless. For instance, instead of four, the number of wives may be eight or more (say even hundred or two hundred). According to Amīr 'Alī, all the marriage contracts shall be irregular as the husband may divorce, at any time, all the wives except four, or at any time all the wives except four may die; the prohibition in that case shall automatically be removed and the marriage contracts shall become valid. To proceed, let us suppose the husband does not divorce any of the wives, co-habits with all of them, each begets a child and neither any of the wives dies meantime;

⁷²*Fatawa Qādī Khān*: op. cit. p. 168 :

”واذا تزوج الحر خمساً على التعاقب جاز النكاح الرابع الاول ولا يجوز نكاح الخامسة وان تزوج خمساً في عقدة فسد نكاح الكل“

Ibn al-Nujaym: op. cit. vol. iii, p. 181 ; Ibn al-'Ābidīn: op. cit. Chapter on *Mahr*, p. 359.

⁷³*Al-Aḥkām al-Shar'iyyah fil Ahwal al-Shakhsyah*, Article 134.

⁷⁴Syed Amīr Ali: op. cit. 5th ed. Chapter vi. p. 280.

⁷⁵Principles of Mohammadan Law, xv ed. Sec. 255 p. 225.

rather the husband himself passes away from this world, leaving the wives all alive and well. What then shall be the status of the fifth, or that of all others exceeding the number of four widows (which may be eight or more)? According to the view point of Baillie and Amīr ‘Alī all the marriage contracts except the first four shall be merely irregular. The children therefore shall be legitimate and entitled to inheritance and the widows except the first four, however, shall get no share in the estate of the deceased.

Pakistan View :

The Lahore High Court, in pre-partitioned days, held that such a marriage contract is not void.⁷⁶ After the establishment of Pakistan, two learned judges of the High Court of West Pakistan, Lahore in their elaborate, exhaustive and painstaking judgement delivered by Justice Muhammad Akram (now a Judge of the Supreme Court of Pakistan) (in the case of *Iftikhar Nazir Ahmad vs. Ghulam Kibria* : PLD 1968 Lah. 587), held that “Injunctions contained in the verse (Holy Qur’ān, Ch. IV, Verse 3, Surah Al-Nisa) are not restricted to times of emergency only : Marriage of a Muslim with a fifth wife in presence of already existing four wives is invalid (*fāsid*), though not inherently void, (*bātil*). The children born of fifth wife in presence of four other wives are legitimate by consensus of opinion among learned. Such fifth wife, however, is not entitled to succeed to estate of the deceased husband.”

Conclusion :

The Holy Qur’ān has fixed the number of wives to the limit of four. Such clear limitation becomes a mockery if allowed to be overridden by the subterfuge of an irregular marriage, as understood by some of the modern writers. Marriage contract with a fifth woman, in the existence of four wives, is, in fact, in the category of void marriages. The rules of a *fāsid* (irregular) marriage, however, are applicable in such a case because of cohabitation in *shubhah fil maḥal* (doubt in the subject) and not because the prohibition is relative, temporary or conditional. The Court shall in all such cases get the parties separated.

Section 36. Marriage contracted with a widow or divorcee during her term of probation (‘iddat) for her previous husband is void ;

Marriage contract
with female observing
her ‘iddat.

Provided that in the event of marriage contracted unknowingly with a widow or divorcee undergoing her term of probation, the rules of irregular marriage shall apply due to cohabitation in doubt. The irregularity having become known separation shall be incumbent upon them. If the parties do

⁷⁶A.I.R. 1928 Lah. 844.

not separate of themselves the court shall get them separated and shall have the power to impose punishment upon them.

COMMENTARY

The manner in which the Holy Qur'ān speaks in respect of marrying a widow observing her term of probation is descriptive yet it is an authoritative expression. Allah has by saying "But do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled",⁷⁷ has commanded widows to restrain themselves from contracting marriage during their term of probation.

'Umar's Ruling :

With respect to contracting marriage during the observance of the term of probation it is narrated by Ibn Shihāb, Sa'īd b. al-Musyyib and Sulayman b. Yasār that the daughter of Ṭalḥa b. 'Ubaydulla was married to Rashīd Thaqfi. Rashīd, however, divorced her. She (the daughter of Ṭalḥa b. Ubaydulla) contracted marriage with Abū Sa'īd b. Manbah or Abul Jalās' b. Manbah during the observance of her term of probation. Caliph 'Umar, because of this transgression (of the limits prescribed by Allāh), got both of them whipped by way of admonition and got separation effected between them. 'Umar said that the widow who contracted marriage during the observance of her term of probation, in case consummation has not taken place, should be separated from the husband. She should then complete the rest of the period of her probation for the first husband. Thereafter the second husband like other suitor may woo her and she may marry him. If cohabitation has taken place, she should be likewise separated from her second husband. Thereafter, she should first complete the rest of the period of probation for the first husband followed by observance of the complete term of probation for the second husband whom she should never marry again. 'Alī has, however, held that if the husband has cohabited with her, she will be entitled to her dower because of the act of cohabitation in doubt. He further held that after observing the term of probation for the first husband she may remarry the second husband. Imām Muḥammad says that he had come to know that 'Umar, in such a case, resiling from his first averment came to agree with 'Ali. Imām Muḥammad also said that we (Ḥanafis) do act upon this authority of 'Ali. Similar is the position taken by Abū Ḥadīfah and most of the Ḥanafī jurists.⁷⁸

⁷⁷ *Al-Qur'ān*, Surah Al-Baqarah (The Cow) ii: 235,

”ولا تعزّوا عقدة النكاح حتى يبلغ الكتاب أجله“

⁷⁸ Imām Muhammad: *Muwatta*: op. cit. p. 245.

Classical View :

Fatāwā ‘Ālamgīrī discussed the marriage contracts of widows during the observance of their term of probation in the same context as the marriage of women married to others. Such marriage contracts have been termed as invalid.⁷⁹ According to *Hidayah* marriage contract of a person with a widow during her term of probation is forbidden, as the pedigree of issues on account of this marriage may become doubtful. In *Fatāwā Qādī Khan* as well marriage contract with a female married to another, or observing her term of probation, has been held to be invalid.⁸⁰

Modern View:

According to Qadrī Pusha of Egypt marriage contract with a woman married to another and with a widow observing her term of probation, prior to its completion, is unlawful, whether the term of probation be on account of divorce, death of the husband or separation due to irregularity of marriage contract or even due to cohabitation in doubt.⁸¹

Of the present commentators on Muslim law, Nawab Abdur Rahman has held such marriage contracts to be null and void intrinsically⁸² but Baillie,⁸³ “Wilson,⁸⁴ Mulla⁸⁵ and Amīr ‘Alī,⁸⁶ hold a marriage contract with a widow observing her term of probation to be irregular and the issues thereof to be legitimate. However, according to them, in such cases after expiry of the period of probation, if the parties concerned are desirous of continuing with relationship of husband and wife, contracting marriage by them *de-novo* is essential. The view expressed by these writers does not appear to be correct. If during the observance of the term of probation the marriage contract is irregular and the irregularity, according to them, is removed with the completion of the period of probation and the

⁷⁹*Fatāwā ‘Ālamgīriyyah* : op. cit. vol. ii p. 7 :

” لا يجوز للرجل ان يتزوج زوجة غيره وكذلك المعتدة “

Al-Kasānī : op. cit. vol. ii, (Kitab al-Nikah) :

” لا يجوز للرجل ان يتزوج المعتدة سواء كانت العدة عن طلاق او وفاة او دخول

في نكاح فاسد او شبهة نكاح “-

⁸⁰Qādī *khān* : op. cit. p. 169.

⁸¹Qadrī Pashā : op. cit. Sec. 27 :

” يحرم نكاح زوجة الغير ومعتدة قبل القضاء عدتها سواء كانت معتدة بطلاق

او وفاة او فرقة من نكاح فاسد او وطء بالشبهة “-

⁸²Institutes of Musalmans Law: op. cit

⁸³Digest of Mohammadan Law, p. 153.

⁸⁴Digest of Anglo-Mohammdan Law, p. 114.

⁸⁵Principles of Mohammadan Law, xv ed. Sec. 257, p. 225.

⁸⁶Mohammadan Law, V. ed. Vol. ii, p. 339, 349.

marriage contract becomes valid where, then, arises the necessity of contracting marriage anew ?

Indo-Pakistan View :

So far as the decisions of indo-Pakistan courts are concerned, there are patent differences. In a judgement of Saddar Diwani 'Adalat, Madras such a marriage contract has been held to be void.⁸⁷ In the case of *Bakht Bibi Vs. Qaim Din* it has been held that marriage contract with a widow during her term of probation is invalid and cohabitation cannot make it valid.⁸⁸ Whereas in the case of *Mst. Roro Vs. Bagh Singh* such a marriage contract has been held to be totally ineffective. But it has also been held that the issues thereof are legitimate and the woman is entitled to get her dower.⁸⁹ In another case of *Jhandoo Vs. Hussain Bibi* the marriage contract during the term of probation has been held to be completely void.⁹⁰

Modern Legislation:

Marriage during 'iddat : A woman undergoing the period of 'iddat, whether of divorce or of death, is not permitted by Islamic law to remarry until the said period has expired. The law in Ceylon enforces this principle by declaring its violation to be an offence. A woman who marries while observing 'iddat as well as a person who aids in or abets the contracting of such marriage shall be punishable under the Muslim Marriage and Divorce Act, 1951. (Section 87). Besides, such a marriage is not to be registered in accordance with the provisions of the Act. (Section 24).

Conclusion :

In my considered view, marriage contract with a widow observing her term of probation is void. Such a woman has not only been forbidden to contract marriage during her probation but also through the Qur'ānic verse, she has been forbidden, during that period, from resolving on the tie of marriage till the prescribed term of 'iddat is fulfilled.⁹¹ A tradition on the subject reported through Qāsim Bin Muḥammad has been quoted in Muwaṭṭā, Imām Mālik. It appears from it that a person is forbidden even to lay his offer of betrothal to contract marriage with a widow observing her

⁸⁷Ref. Macnaughton, p. 566.

⁸⁸A. I. R. 1934 Lah. 907.

⁸⁹A. I. R. 1935 Lah. 23.

⁹⁰I. L. R. 4 Lah. 192.

⁹¹*Al-Qur'ān*, Surah Al-Baqarah (The Cow), ii, 235 :

” لا تعزمو عقدة النكاح حتى يبلغ الكتاب أجله ”

term of probation.⁹² The marriage contract with a widow observing her term of probation is void and in the event of consummation with her the parentage shall not be established. But if it was not known at the time of marriage contract that she was observing her term of probation and the husband cohabited with her, then, on the rules of an irregular marriage will apply on the basis of "doubt in the act" and the irregularity having become known separation between the parties shall become incumbent. If the woman observing iddat is the divorced wife of that man himself and he marries and cohabits with her in that state, then alone, the issues will be considered to be legitimate and the dower shall also be payable by the man to the woman, as it would be a case of cohabitation for doubt in the subject.

Section 37. Re-marriage of a thrice divorced wife with her former husband, without an intervening consummated marriage rendering her lawful, (*ḥalalah*) to the first husband, is unlawful.

Marriage with thrice-divorced wife.

COMMENTARY

Thrice divorced wife literally means the wife who has been pronounced with three divorces. In legal terminology she is that wife who has been separated by three divorces either at one and the same time or at different times, either by one word e.g. you are divorced thrice or by three words of *ṭalāq* (e.g. you are divorced, you are divorced, you are divorced or you are divorced, divorced, divorced) or words with similar but clear connotation. The wife after three divorces, becomes unlawful for the husband. The husband has no right either to have recourse to her during or after completion of the term of her probation or to re-marry her afterwards, without an intervening consummated marriage. If the wife, however, has only been divorced once or twice, the husband has a right to have recourse to her during the observance of her term of probation or remarry her after the completion of her term of probation, without an intervening marriage.

Qur'anic injunction :

It is revealed in the Qur'ān, "A divorce is only permissible twice : after that, the parties should either hold together on equitable terms or separate with kindness."⁹³ According to this Qur'ānic verse, a husband, during the continuance of his marriage, has a right to use his power of revocably divorcing his wife at the most twice. Hence, the husband who,

⁹²Imām Mālik: Muwaṭṭā, op. cit. Karachi, p. 435.

⁹³*Al-Qur'ān*, Surah Al-Baqarah, (The Cow), ii, 229 :

“الطلاق مرتان فإمساك بمعروف أو تسريح بإحسان”

after divorcing and having recourse to his wife twice, divorces her for the third time, she is separated from him irrevocably. In other words, in case of one or two divorces, the husband has a right to have recourse to his wife before the expiration of the term of probation of the wife. Even after the expiration of the term of probation in case of one or two divorces the man and the woman may by mutual consent remarry each other. But, in case of a third divorce, neither the man has the right to have recourse to the woman nor they can re-enter into fresh contract of marriage, except when the woman marries another man and he after having intercourse with her divorces her or dies ; thereafter the previous husband after the expiration of her consequent term of probation, may contract marriage with her. The condition of contracting marriage with another man, in such a case, has been imposed by Qur'ān itself under the verse. "So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they reunite, provided they feel that they can keep the limits ordained by Allah".⁹⁴

‘Arab Custom :

Before the revelation of this verse there was no limit to divorces among the ‘Arab infidels. A man divorced his wife as many times as he wished and before the expiration of her term of probation had recourse to her. Keeping the woman thus in suspense was a continuous torture to her. To change this practice this verse was revealed. Thereby there remained no possibility of pronouncing divorce more than three times and in case this was done no right remained in the husband to have recourse to the wife or even remarrying her without an intervening consummated marriage with another person making her again lawful (*ḥalāl*) to the first husband.⁹⁵ Even if the man and the woman consent to remarry, the marriage cannot be contracted except when the woman contracts her marriage with somebody else and is divorced by him or he is dead. Thereupon, if they feel that they would remain within the limits ordained by Allah, they may remarry each other, the consummation of the intervening marriage being obligatory.

Practice during Prophet's time :

During the Prophet's time (peace be on him) the practice was to ask the man who pronounced three divorces at a time to declare on oath what his true intention was. If he said that his intention was of one divorce and the use of the word of three or the repetition of the word, 'divorce, divorce,

⁹⁴ *Al-Qur'ān*, Surah Al-Baqarah (The Cow), ii: 230,

”فإن طلقها فلا تحل له من بعد حتى تنكح زوجاً غيره“

⁹⁵ Ibn al-Kaṭṭīb; *Tafsir al-Qur'ān* :

divorce,' three times, was made merely with a view to put emphasis on the act, the three divorces were accepted to be one revocable divorce. If he said that his intention was of three divorces, they were taken to be as such. A tradition is reported by Maḥmūd b. Labīd that the Prophet was informed that a person had pronounced three divorces at a time. The Prophet in anger got up and said, "Do people play with the Book of Allah in spite of my presence among them."⁹⁶

Caliph 'Umar's enforcement :

'Umar, the second Caliph found that people had at times made a plaything of divorce. They pronounced three divorces but on finding that their wives were irrevocably separated, they said that their intention was of pronouncing one revocable divorce only. He, therefore, strictly enforced the rule of an irrevocable divorce pronounced thrice at a time, as the implications had become known by that time.

General View :

The view point of jurists in general with respect to the question of 'thrice divorced woman' is that if a man divorces his wife by pronouncing at a time three divorces one after the other i.e. uttering three times the word, "divorce, divorce, divorce or saying "I give you three divorces", it will constitute three divorces'. As a consequence thereof, the wife shall at once go out of the relationship of being a wife to her husband ; and the husband shall not have the right of having any further recourse to her. Nor, after the expiry of the term of probation, shall they be entitled to recontract marriage with each other, until the woman is married to somebody else and he, after consummation, either divorced her or she died.

Prophet's Traditions :

The jurists in support of their view (which has been discussed elaborately in the "Law of Divorce" *infra*) put forward the following tradition which is recorded by Imām Bukhārī in his *Ṣaḥīḥ*—

"Uwaymir 'Ajlānī imprecated his wife, (Imprecation: Calling curse and wrath of Allah on whoever is a liar : when a husband charges on oath his wife with adultery and she on oath declares her innocence), and before any direction was issued by the Prophet for separation 'Uwaymir in one sitting uttered three divorce with one word. It is stated in the above quoted tradition that 'Uwaymir told the Prophet, "I shall tell a lie if I keep her with me." He ('Uwaymir) then, imprecated

⁹⁶Nasā'ī : *Al-Sunan*, Karkeana Tijarat-i-Kutub, Kar. vol. ii, p. 81 :

"عن محمود بن لبيد قال اخبر رسول الله صلى الله عليه وسلم عن رجل طلق امرأته ثلاث تطليقات جميعا فقام غضبان ثم قال يا ايها العبد بكتاب الله عز وجل وانا بين اظهركم".

his wife and divorced her thrice, before the Prophet issued any direction.”⁹⁷

The generality of jurists argue on the basis of this tradition that the Prophet did not refute the triple divorces with one word. If the triple divorces with one word had not been valid, the Prophet would not have kept silent. Here, the ‘silence’ of the Prophet substitutes itself for an averment of Prophet (in view of the above tradition) with respect to the effectiveness of a triple divorce with one word. Some of the jurists, however, do not agree with this argument in respect of the above tradition. According to them, the woman who has been imprecated stands divorced on account of the imprecation itself. Hence, divorcing an imprecated wife amounts to divorcing a woman who stands already divorced and is then a stranger. Imām Bukhārī, in this connection, has, in his *Ṣaḥīḥ* mentioned a tradition, reported from Ibn Shihāb Zuhri to the effect that Sahl b. Sa‘ad said that he was present at the imprecation congregation. After the imprecation, and before the Prophet gave direction for separation, ‘Uwaymir pronounced a triple divorce to his wife. Thus a rule of the law was established that after imprecation separation ought to be effected.⁹⁸ According to Ḥanafī jurists, on the basis of this principle, separation through imprecation by itself cannot be effective. It has to be effected through the court. The marriage contract shall subsist till the court does pass a decree for separation.

These is another tradition reported through Ibn ‘Umar—

“It so happened that Abdullah b. ‘Umar pronounced one divorce to his wife. He, afterwards, enquired of the Prophet “whether it would have been valid for him to have recourse to his wife if he had uttered three divorces to her.” The Prophet answered, “No, the woman, by your so divorcing, would have become irrevocably separated from you and your having recourse to her would have been a sin”.⁹⁹

Traditions of the Companions :

There is a tradition : “A person said to Ibn ‘Abbās that he gave his wife a hundred divorces. Ibn ‘Abbās replied that she became irrevocably separated from him after his three divorces, and with the ninety seven of divorces he made fun of Allāh’s verses”.¹⁰⁰ Likewise, Imām Mālik in his *Muwattā* states that a person came to ‘Abdullah b. Mas‘ūd and said that

⁹⁷Bukhārī; *Ṣaḥīḥ* Muḥtabai Press: Delhi; vol. ii, p. 791.

⁹⁸Ibid, p. 695.

⁹⁹Imām Mālik : *Muwattā* ; (Eng.-Urdu), Karkhana Tijarat-i-Kutub, Karachi (Kitāb al-Talāq), p. 456.

¹⁰⁰Ibid.

he gave his wife two hundred divorces. Ibn Mas'ūd replied that the woman had become irrevocably separated from him.¹⁰¹

Jurists' argument :

A great majority of jurists argue on the basis of the above traditions (and the other traditions that have been dealt with in the "Law of Divorce" *infra*) that in the event of three divorces pronounced at a time, either by saying "Three Divorces" or by saying 'Divorce, Divorce, Divorce', separation will take effect as effectively as by three divorces pronounced at intervals of three pure and clean periods of the menstrual cycle.

The other group of jurists, comprising of Zubayr b. 'Awām, Abdur Raḥmān b. 'Awf, 'Ikramah, Tā'ūs, Muḥammad b. Ishāq, Hārith 'Aklī, Da'ūd b. 'Alī al-Zāhirī, Ibn Taymiyya, his disciple Hāfiz Ibn al-Qayyim, is of the view that if the husband divorces his wife thrice at a time or says that he has divorced her thrice, that kind of divorce shall not be irrevocable (*mughallizah*); it will rather be a revocable one, and the husband shall have the right to have recourse to his wife during her term of probation. Even after the expiration of the term of probation, if they consent, they can remarry. According to them, there is only one method of three divorces being effective, and that is by three separate divorces in three pure and clean periods of the menstrual cycle. The divorce shall then become irrevocable and the woman without an intervening consummated marriage cannot be validly remarried to the first husband. The jurists of this group base their argument on the Qur'ānic verse,

الطلاق مرتان فامساك بمعروف أو تسريح بإحسان

"A divorce is only permissible twice ; after that the parties should either hold together on equitable terms or separate with kindness." Their contention is that divorce cannot be effected except by pronouncing one after the other, and that after the first two pronouncements of divorces there remains the right of having recourse to the wife. If the three divorces be pronounced at a time, putting the said three divorces into effect at once, the question of the possibility of having recourse to the wife does not arise and this is against the intent of this verse of the Qur'ān. It is, further, argued that the Qur'ān has given the husband the right of pronouncing three divorces, which are intended to be used three times, so that if the husband repents after pronouncing the first or the second divorce he may have the opportunity of remedying the injury during the probation period by having recourse to the wife without contracting a remarriage ; and even after the lapse of the term of probation if the couple be agreeable, they may re-enter into marriage contract with each other. While, in the event of

¹⁰¹Ibid, p. 457.

pronouncement of divorce for the third time, there shall be no right to the husband to have recourse to the wife or to remarry her without her being made legalised (*ḥalālah*) for him.

Their second argument is that Allāh has used the word '*Marratōn*' (two times), not the word '*ithnatayn*' (two). From this it is, in fact, intended that divorce be pronounced two times, not that the two divorces be pronounced at one time. Same rule, obviously applies in three (divorces). It is thus argued that the words, "*Al-ṭalāq Marratōn*" (the divorce is two times) tend to mean that divorces be pronounced at intervals. If a person pronounces two divorces at a time, it will not be correct to say that he pronounced them at intervals. As for instance, if a man, at a time, gives two rupees to another man, it will not be correct to say that he gave him a rupee twice, as the handing over of the money was not at intervals. If the intention of the words of the Qur'ān had only been to confer on the husband the right of having recourse to his wife, there was no reason to choose the word, "*Marratōn*" as the right of man having recourse to his wife would subsist, even in the event of a man pronouncing two divorces at one time.

This group of jurists, in further support of their contention, cites the following traditions from Ibn 'Abbās :

"Rukanah b. 'Abd Yazīd pronounced three divorces to his wife in one sitting. He was extremely sorry for this. The Prophet enquired of him as to how he had pronounced the divorces to his wife? Rukānah replied, "Three in one sitting." The Prophet thereupon said, "Verily, it is one divorce, if you wish you may have recourse to her." Rukānah in answer said, "I do forthwith have recourse to her".

The generality of jurists refuse to accept this tradition as such. Firstly, because the authentic reported ruling of Ibn Abbās himself is against this. Secondly, because the pronouncer of divorce did not use the word "*al-ṭhalāṭhatah*", triple, rather he used the word, "*al-battatah*," which literally means "cutting off" and in legal terminology it means "final" or "indispensable". As the word used by Rukānah was a general term, the Prophet asked Rukānah to declare on oath what was his intention. Rukānah replied that he had the intention of pronouncing one divorce. The Prophet thereupon permitted him to have recourse to his wife. (For detailed discussion on this tradition see Law of Divorce *infra*.)

The controversy boils down to this: whether on pronouncement of three divorces at one time they shall at once become operative as such or would they operate merely as one revocable divorce ? The reasons of this difference of opinion on the subject are two :

First is that the jurists, who consider divorce to resemble the acts which become incumbent upon a person by his own volition, consider that if the three divorces be pronounced together at one time they would come to mean three separate divorces and shall take effect as three final and irrevocable divorces. But jurists who consider divorce to resemble acts which for their validity depend on observance of sanctioned procedure, consider that pronouncing of three divorces at a time shall amount to one revocable divorce.

The second reason for difference of views is that the jurists who consider the above verse (II : 229) to be a mandatory provision, hold that acting against this is invalid, forbidden and unlawful. Hence of the three divorces if they be pronounced at one time, one will become effective and the rest two shall remain ineffective.

But the generality of jurists, in this verse regarding divorce, find stated therein only a correct and preferable procedure. All the three divorces, according to them, would become consequently effective. Such pronouncer of divorces, however, shall be committing a sin, in as much as he has contravened a prescribed religious mode. In support of this contention they say, by way of example, that there is the Qur'ānic commandment of not buying and selling things after the call of Friday prayer (LXII : 9)¹⁰². If, however, buying and selling is done, it will be valid and effective. The buyer and seller shall, however, commit a sin. Likewise, it is not proper to offer prayers on a land illegally taken possession of. If, however, prayer is offered on such land the prayer shall be considered as duly performed, but the man offering the prayers shall, however, commit a sin (if he knows of the fact of usurpation).

Modern Legislation :

In most of the Muslim countries such as Egypt,^{102a} Syria,¹⁰³ Tunisia, Iraq and Morocco, presently the view accepted is that divorce for financial consideration (compensation for Khul'a) and divorce completed at three intervals are irrevocable. Besides these, three divorces pronounced at one time are taken to amount to one single (revocable) divorce.

Pakistan :

Similar law is in force in Pakistan. Section 7 of the Family Laws Ordinance VIII of 1961 reads as follows :

“(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *ṭalāq* in any form whatsoever, give the

¹⁰² “ إذا نودي للصلاة من يوم الجمعة فاسعوا إلى ذكر الله وذروا البيع ”

^{102a} Qadri Pasha: op. cit. Sec. 227-229.

¹⁰³ Mustafā Al-Sabba'ī : *Sharḥ Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria, Sec. 94, p. 158.

Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

- (2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.
- (3) Save as provided in subsection (5), a *ṭalāq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman.
- (4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.
- (5) If the wife be pregnant at the time *ṭalāq* is pronounced the *ṭalāq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.
- (6) Nothing shall debar a wife whose marriage has been terminated by *ṭalāq* effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

It is laid down under the said Ordinance VIII of 1961 that the man who intends to divorce his wife must after pronouncing divorce, inform the Chairman of it in writing and he shall be bound to send a copy of the same to his wife. This divorce shall not be effective till ninety days from the date of the receipt of the information by the Chairman, except that the divorce has been revoked expressly or otherwise, before the expiry of the said ninety days. In sub-section 5 of the above section it has also been laid down that the divorce, if pronounced during the pregnancy of the wife, shall not be effective until the said period of ninety days expires or the child is born, whichever is later. The effectiveness of divorce has, however, been kept in abeyance for ninety days from the date of the receipt of information by the Chairman. In other words, the divorce shall remain ineffective for ninety days after the receipt of its information by the Chairman. Some questions however arise in respect of these provisions :

- (i) No time limit has been fixed for giving information of the divorce pronounced to the Chairman. If the divorce is pronounced orally or in writing in presence of witnesses and the wife, but no information as provided under the said section is given to the Chair-

man, will the divorce, then, according to the provision of Family Laws Ordinance, remain ineffective ?

- (ii) After the intimation to Chairman, the divorce remaining in abeyance for ninety days, means that the divorce as such is ineffective. If the man after pronouncing one divorce duly informs the Chairman and during next purity period of the wife pronounces another divorce what shall be its effect and how will it govern sub-section (6) of Section 7 above, and what shall be the starting point of ninety days ?
- (iii) If the divorce becomes operative after ninety days of the intimation given to the Chairman, from what point of time shall the period of probation be counted ? If the period of probation is counted from the date of expiry of ninety days, then during these probation days there would also remain with the man, the right of having recourse to his wife. What shall then be the effect of having recourse to the wife during these ninety days ? If the divorce is not operative and is ineffective how the question of having recourse to wife would be decided and what acts shall constitute recourse ?
- (iv) If the man has recourse to his wife before the expiration of ninety days, will or will not the one divorce pronounced by him be considered as a revocable divorce and whether there remains to the man the right of pronouncing two divorce only ? If the divorce is ineffective for ninety days how will the act of the man's having recourse to her affect his right of pronouncing other divorces ?
- (v) In the *Arbitration Council*, if the man is willing and the woman is unwilling to reconciliation what then shall happen to the right of man having recourse to his wife under the law of *Shari'ah*.

Suggestions :

1. It would be better to have the *Arbitration Council* formed prior to the pronouncement of divorce. If the divorce has been really pronounced it would be contrary to *Shari'ah* to keep its effect and operation in abeyance for ninety days. In case of divorce having been pronounced, it shall take effect forthwith and the period of probation too shall start at once, except in the case of the pronouncement of divorce to a wife who has not been cohabited with, as there is no right of having recourse to such a divorced wife. The husband shall, however, have the right of having recourse to his wife, who has been cohabited with, before the expiry of ninety days and he can, without the consent of such wife, use his right of having recourse to her. On the expiry of the ninety days from the pro-

nouncement of divorce, the right of having recourse to the wife shall come to an end.

2. In many cases it happens that though a husband divorces his wife and contracts marriage with another woman yet abstains himself from sending a notice to the Chairman. When the divorced wife contracts her marriage with another man the *Nikāh* Registrar refuses to register such marriage in the absence of a certificate of divorce by her first husband to be issued by the Chairman, to whom no notice of divorce has, in fact, been given. If the wife sends the notice that she has been divorced, proceedings are not initiated on her application as the absence of a notice of divorce from the husband leads to presumption of revocation of divorce. The poor woman is left to suffer, and her fate is left in suspense. Necessary provision in the law may be made enabling the wife too, to send intimation of divorce to the Judge of Family Court and initiate the proceedings.

3. In case of divorce pronounced during pregnancy the period of divorce remaining ineffective has also been prescribed as 90 days or until the pregnancy is over whichever is later. According to the view of the four A'imma the period of probation of a pregnant divorcee or widow is co-extensive with the pregnancy itself as also laid down in Surah Al-Talaq of the Holy Qur'an : *واولات الاحمال اجلهن ان يضعن حملهن* "For those who carry (life within their wombs) their period is until they deliver their burdens". (LXV: 4) (For full discussion see Law of 'Id'at *infra*.)

It is thus necessary that, in the light of what has been said, suitable amendments be made in the Pakistan law, so as to conform it above the dictates of the holy Qur'ān and the Sunnah.

Marriage with one's own thrice-divorced wife :

However, so far as the marriage contract of a man with his thrice divorced wife is concerned, it is, without her being made *halala* (legalised), null and void. In case of consummation of marriage without legalisation the rules relating to cohabitation-in-doubt shall be made applicable to such marriage contract. According to Abū Ḥanīfah the man is liable to severe punishment if he is aware of the prohibition. According to Ṣāhibayn Abū Yūsuf and Muḥammad (Al-Shaybānī) and Imām Shafi'ī, if the man is aware of the prohibition he shall be imposed with *ḥadd* punishment.¹⁰⁴ Shaykh Qasim, in his *Tashīḥ*, has stated that final verdict is in accordance with the opinion of Imām Abū Ḥanīfah. But it is stated in *Fatāwā* of Quḥistānī reported in '*Muḍmarāt*' that the verdict is on the view taken by Ṣāhibayn, two illustrious disciples of Abū Ḥanīfah, because after being aware of his own acts there remains no occasion for doubt either in the marriage contract (*shubha fi'l aqd*) nor the doubt in the subject

¹⁰⁴*Sharh al-Wiqayah*, Muḥtabai, Press, Delhi, vol. ii, p. 283, 289.

of marriage (maḥal), the lady. Hence cohabitation, according to *Ṣaḥibayn*, shall plainly be an act of adultery and *ḥadd* (punishment) shall be imposed. In the view of this writer as well, the opinion of *Ṣāḥihayh*, in this respect, appears to be logical.

The author of *Hidāyah* maintains the marriage contract of a man with his wife pronounced with three divorces without her being made legalised, as illegal. In *Fatāwā ‘Ālamgīrī*, too, such a marriage contract has been said to be illegal. Baillie, Mulla and ‘Amīr Alī hold such a marriage contract to be irregular. In the *Ahkām al-Sharīyya* of Qadrī Pasha of Egypt translated by Nawab Abdur Raḥman as “a Institutes of Mohammadan Law”, indeed, such a marriage contract has been said to be void.

Courts’ View :

As far as the Indo-Pakistan courts are concerned their leaning is in favour of holding the marriage contract by the man with his wife pronounced with three divorces, without her being made legalised, to be void.

Conclusion :

There is, in my view, a plain and clear Qur’ānic commandment with respect to one’s contract of marriage with the thrice divorced wife. Such a marriage contract ought to be held void. If the man, however, has cohabited with such a wife, there being no proof of his knowledge of the prohibition, *ḥadd* punishment shall not be imposed upon him. He shall be only penalised and separated from the woman. In case it is proved that they had knowledge of the prohibition before they entered into marriage, *ḥadd* punishment will be inflicted on them or either of them as the case may be. In the event of the man not incurring *ḥadd* (punishment of adultery) the rules about cohabitation in doubt apply.

Section 38. Marriage contract with a woman in pregnancy of a validly established pedigree is unlawful and void.

Marriage with woman in pregnancy of established pedigree

COMMENTARY

There is a consensus of opinion on the point that the marriage contract with a woman validly pregnant i.e. by her husband (or master if she be a slave) is void.¹⁰⁵ If, on the other hand, the pregnancy be the result of one’s own adulterous act, the marriage as well as consummation with her shall

¹⁰⁵*Fatāwā ‘Ālamgīriyyūh*: op. cit. vol. ii, p. 7-8 :

”وَحَبْلِي ثَابِتُ النِّسْبِ لَا يَجُوزُ نِكَاحُهَا أَجْمَاعًا“

be valid.¹⁰⁶ However, in cases of an adulterous pregnancy by some other person though marriage with the woman is valid, consummation will have to wait till delivery.¹⁰⁷ Qadri Pasha of Egypt, none the less, holds such marriage to be void.¹⁰⁸

Section 39. If a man commits adultery with a woman, his marriage contract with her mother and her daughter shall stand as within prohibited degrees to him. In case the marriage is contracted in doubt and cohabitation takes place, the rules of an irregular marriage shall be applicable.

Marriage with mother and daughter of one's own mistresses.

COMMENTARY

According to Imām Abū Ḥanīfah and some other A'immaḥ, for instance, Sufyān Thawrī, 'Awza'ī, Aḥmad b. Ḥanbal, if a man commits adultery with a woman, her mother and her daughter shall for marriage purposes be forbidden to him and the sanctity of affinity shall be established against the adulterer and the adulteress. According to Imām Shafi'ī, however the sanctity of affinity is established only on account of a valid marriage contract and not on account of adultery. Therefore, marriage by the said man, according to him, with the mother or the daughter of the adulteress is not prohibited. But the generality of 'Ulama' concur with Abū Ḥanīfah on the ground that the real cause of prohibition is the sexual intercourse,¹⁰⁹ not the marriage. Therefore, if a man commits adultery with a woman, the mother of that woman shall be prohibited to him. The mother of her mother, howsoever high in degree, shall all be prohibited to him. The daughter of the woman and the daughters of the daughter, howsoever low in degree, shall all likewise be prohibited to him for marriage. In the same manner forefathers, howsoever high in degree, and the sons, grand-

¹⁰⁶Ibid :

” اذا تزوج امرأة قدزنى هو بها وظهر بها حبل فالنكاح جائز عند الكل وله ان يطاها عند الكل “

¹⁰⁷Ibid :

” وقال ابو حنيفة و محمد رحمهما الله تعالى يجوزان تيزوج امرأة حاملا من الزنا ولا يطاها حتى تضع وقال ابو يوسف لا يصبح والفتوى على قولهما “-

¹⁰⁸Qadri Pāshā: op. cit. Sec. 29 :

” يحرم نكاح الحامل ثابت النسب حملها ويصح نكاح الحامل من الزنا ولا يواقعها الزوج حتى تضع حملها مالم يكن الحمل منه “

¹⁰⁹Umar 'Abdullah: *Ahkam al-Shari'at al-Islamiyyah*, Egypt, 1961 :

” وراي جمهور التابعين ثبوتها بالزنى “

sons, howsoever low in degree, of the man who commits adultery with the woman are all prohibited to the said adulterous woman.¹¹⁰

As is the sanctity of affinity established from sexual intercourse so also it is established from erotic touching, kissing and looking at the private parts with lust.¹¹¹

Under the Code of Muslim Personal Law (known as *Ahkam al-Shar'iyyah fil Aḥwal al-Shakhsiyyah*) compiled by Qādrī Pasha of Egypt, contracting of marriage by a man with the mother or daughter of a woman with whom he has committed adultery is forbidden. Likewise, contracting of marriage by a woman with one of the ascendants or descendants of the adulterer is forbidden. But the marriage contract of one of the ascendants or the descendants of that man with one of the ascendants or descendants of that woman is not forbidden.¹¹²

Effects :

If the adulterer marries one of the ascendants or descendants of the concerned woman, the marriage contract, shall be void. But if consummation takes place in doubt (of sanctity of affinity) the rules relating to an irregular marriage contract shall apply. When the irregularity becomes known separation shall become incumbent. If they do not separate of themselves, the Qādī (Court) ought to get them separated. In such a case the parties, due to doubt in the subject (*maḥal*) of marriage shall not be held liable to *ḥadd*, but are bound to be punished. As such a marriage contract is formally treated as irregular, the woman's dower shall become due on the man, observance of the term of probation shall be incumbent upon the woman, her maintenance allowance shall become chargeable from the man and their issues shall be considered to be legitimate.¹¹³

Section 40. Mut'ah is illegal and constitutes no marriage Mut'ah at all.

¹¹⁰*Fatāwā 'Ālamgiriyyah*: op. cit. p. 4; Al-Marghīnānī: *Al-Hidayah*, Muḥtabāī, Delhi, vol. ii, p. 289; Damād Āfandī, op. cit. vol. i, p. 326.

¹¹¹*Fatāwā 'Ālamgiriyyah* : op. cit. vol. ii, p. 5 :

”من مس امرأة بشهوة حرمت عليه أمها وبنتها“

Al-Marghinani; op. cit. vol. ii, p. 289 :

¹¹²Qadrī Pasha: op. cit. Sec. 24:

”يحرم على الرجل ان يتزوج اصل منزلة وفرعها وتحرم عليهم اصولها وفرعها“

¹¹³Umar Abdullah ; *Ahkam al-Shari'at al-Islamiyyah*, Egypt, 1961, p. 142.

COMMENTARY

Mut'ah is an agreed sexual relationship, a *quasi* marriage contract with a consideration, entered into between a man and a woman with the intention of enjoying sexual intercourse with the woman for a fixed period of time. The man, under this contract, gets the right of keeping a woman as a concubine for a fixed period solely for himself. She, during that period, will not be allowed to have sexual relationship with some one else.

Mut'ah in the Past :

Most of the instances of such contracts are to be found in Iran and Iraq. It is very rare in Indo-Pak sub-continent. This custom was prevalent among the *Ṣabi'īn* (star-worshippers) and *Zartushtarians* (fire-worshippers). During the rule of *Safawīd* dynasty when *Shi'ism* became the official religion of Iran, *Mut'ah*, as a custom, re-appeared in Iran.

Mut'ah and Muslim Sects :

Mut'ah according to the unanimous view of the *Sunnī* Jurists, is illegal.¹¹⁴ Among the *Shi'ah*, only *Ithnā 'Asharis* hold *Mut'ah* to be valid while other *Shi'ah* sects, for example, *Isma'iliyah* and *Zaidiyah* consider such sexual relationship as illegal. According to *Ithna 'Asharis* a man may at a time contract *mut'ah* marriage with as many females as he likes. The females must be *Shi'as* or *Kitābiyyās*. *Mut'ah* with females of any other religion is not valid. A *Shi'ah* female, however, can contract *mut'ah* marriage only with a *Shi'ah* male.

Incidents of Mut'ah :

Mut'ah is contracted for a fixed period. It is contracted with the word, *Mut'ah* (enjoyment). The words, "contract of marriage" are not used. The male has to make some payment, (in cash or kind) as consideration for enjoying the female. If no consideration is fixed the contract shall be null and void. In the event of cohabitation taking place with the female, the entire consideration amount becomes payable, otherwise only the half of it is to be paid. In *mut'ah* the female is not divorced. The contract after the lapse of the fixed period, automatically terminates and the parties separate. The man may during the fixed period at anytime remit the rest of the period in favour of the female and terminate the contract. The female, however, cannot free herself on her own before the expiration of the fixed period. In consequence of *mut'ah*, the parties to *mut'ah*, cannot inherit from each other. Though their issues, indeed, are considered to be legitimate. The female, in *mut'ah* is not entitled to maintenance, because

¹¹⁴*Al-Marghīnānī* : op. cit. p. 292 ; *Damād Āfandi* : op. cit. vol. i, p. 331.

the term "wife", in the real sense, is not applicable to a female contracted by Mut'ah. She is called "mamtu'ah", not zawjah.

Mut'ah and the Qur'an :

Sunni 'ulama in proof of *mut'ah* being prohibited quote the following Qur'ānic verse, "Who abstain from sex, except with those joined to them in the marriage bond, or (the captives) whom their right hands possess, for (in their case) they are free from blame but those whose desires exceed those limits are transgressors."¹¹⁵

The women with whom, under this verse, sexual intercourse has been permitted are only of two kinds : one is the wife and the other is the slave girl (captive) under the ownership of her master. Except with these, sexual intercourse with all other women is illegal. The woman contracted under *mut'ah* is neither a wife, nor a slave girl, in as much as the rights and obligations of a wife that have been stated in the law of Shari'ah are not applicable to a woman contracted under *mut'ah*. The rules of maintenance, divorce, *ilā'* (divorce pursuant to vow), *zihār* (husband's comparing his wife to his mother or to any other female within prohibited degrees), *lī'an* (imprecation) and the rules of inheritance have also no application to such woman. The restriction to the extent of having under coverture four wives at a time is also inapplicable in case of a *mamtu'ah*. Similarly any question by way of her being a slave girl does not arise, in as much as she being a free woman, is not under the ownership of the man, nor can she be sold or given away by way of gift. As she is excluded from both the categories of women i.e. the wife and the slave, the one who seeks her for intercourse is, in the words of the holy Qur'ān, the person who exceeds the limits prescribed by Allāh and he is a transgressor.

Mut'ah and the Traditions :

Some proponents argue that in early days of Islam the custom of *mut'ah* contract was permitted in Arab society but later on this permission (which at best could be said to be implied) was taken back. Imām Muslim has reported a tradition through Rabī' b. Ma'bad Juhnī, whose father stated to him that once he was with the Prophet who said, "O, ye people! I had permitted you to take use of women (temporarily) but Allāh has now forbidden it till the day of resurrection. Hence, those who have such women must give them up and whatever has been given to them must not be taken back." Muslim has through other authorities also reported this particular tradition. Ibn Mājah too has through a chain of reliable

¹¹⁵ *Al-Qur'ān*, Surah Al-Mominūn (The Believers) xxiii: 5-7 :

”والذين هم لفروجهم حافظون الا على ازواجهم او ما ملكت ايما نهم فانهم غير ملومين فمن ابتغى وراء ذلك فاولئك هم العادون“.

narrators reported that 'Umar gave a sermon on the subject and said, "The Prophet permitted *mut'ah* on three occasions but later made it unlawful. If any one being married does contract *mut'ah* I shall certainly (in punishment) stone him". In another tradition reported from him it is stated that when 'Umar was asked about *mut'ah* he categorically declared that *mut'ah* was unlawful.

Imām Muslim has also recorded the following tradition in his *Sahīḥ*:^{115a} "In the year of conquest of Mecca, the Prophet on entering into Mecca permitted us to go in for *Mut'ah* contracts. But we did get out of Mecca only after we were (by his order) forbidden from contracting *mut'ah*. *Khazani* has also authoritatively reported through Jābir a tradition: "The Prophet gave a sermon at Tabūk. He praised Allāh and forbade people from contracting *Mut'ah*".

It, however, appears from the *Āthār* (traditions of the Companions) that Ibn 'Abbās considered *mut'ah* to be valid. Alongwith him some of the *Tabi'īn*, (Successors of the Companions) for instance, Ibn Jurayj, Ta'ūs and Aṭā also held that view. Ibn 'Abbas, however, did not consider it to be unconditionally valid. In his view its validity was confined to the occasion of absolute necessity.¹¹⁶

Bukhārī and Muslim have reported another (tradition) from 'Ali. They say, 'Ali heard about Ibn 'Abbās that he took a lenient view about *mut'ah* contracts. He, thereupon, said to Ibn 'Abbās, "O Ibn 'Abbās ! give up (your opinion about) *mut'ah*. Truly, the Prophet has on the day of *Khaybar* forbidden *mut'ah* and the eating flesh of the ass". Al Marghīnānī, author of *Hidayah* has accordingly recorded that Ibn 'Abbās had retracted his earlier opinion.

Shi'i Law :

In *Sharī'ah*, a marriage must be intended to be a life long union. Hence, in *Sunni* law, any condition or stipulation by which the parties seek to set a time-limit to their union renders the whole contract a nullity, since it is an agreement contrary to the very essence of marriage. Shi'i law, however, recognises another legal form of sexual union in the institution of *mut'ah* whereby a woman agrees to cohabit with a man for a specified period of time in return for a fixed remuneration without, in itself, giving

^{115a}Muslim: *Sāhiḥ*; *Bakharī*; *Sahih* (Ni'kāḥ al-Mub'ah).

¹¹⁶The very words of Ibn Abbās are : ،، هبى كالميتة لاتحل الا للمضطر ،، It is like the prohibited meat of a dead animal which is not permissible to take except for a person suffering from starvation at the verge of death, just to save his life and to that extent only. But to the present writer, the simile is not appropriate. In *mut'ah*, there is no question of life-saving.

rise to mutual rights of inheritance between the partners, although such rights may be created, according to traditional *Shi'ī* doctrine, by stipulation. It seems, however, that under the current Civil Code of Iran (Article 940) such a stipulation will be void (Coulson : Law of Family Relations, P. 17).

Conclusion :

In the opinion of the present writer, there is a misunderstanding about *mut'ah* being made valid on the occasion of the conquest of Mecca. The fact appears to be that on that occasion some Muslims began to contract temporary marriages¹¹⁷ with women of the place on a nominal dower with the 'intention' of giving them up when going back to Medina after some time. The Prophet silently watched their acts for a few days. He found that it was an act against the very spirit of marriage contract. He therefore forbade it.

So far as the tradition of Ibn 'Abbās is concerned, Tirmidhi has reported from Ibn 'Abbas himself that the custom of *mut'ah* did obtain in the early days of Islam. Consequently when some one came to a new city and knew nothing about that city, he used to contract marriage with a woman for the period that he intended to stay in that city. The woman took care of his property and kept his affairs in order. Such was the case till the verses (xxiii : 5-7) above quoted were revealed. Then said Ibn 'Abbās, "Now, except the two (categories) every other uterus (female) is unlawful."¹¹⁸

Through the above quoted traditions, one may conclude that *mut'ah* was held to be valid till the conquest of *Khaybar*, battle of *Tabūk* and the conquest of Mecca. But the fact is otherwise. So far as the tradition relating to the conquest of *Khaybar* is concerned, it postulates two things : one that the flesh of the ass is unlawful, and the other that *mut'ah* is forbidden. The narrator of both the traditions is the same person. It appears that he, while narrating, put the two pronouncements together, although, as regards language, context and place, the said two pronouncements are quite distinct and separate. Ibn al-Qayyim has rightly raised the objection as to how *mut'ah* could be held to be valid on the occasion of the conquest of *Khaybar* (or how can the question of forbidding it on that occasion itself arise?), when there was no Muslim woman present there at *Khaybar*. The narrator of the tradition mentioning *Tabūk* is

¹¹⁷There is difference between temporary marriage and *mut'ah* which has been discussed in the next section.

¹¹⁸Al-Tirmidhi: *Al-Jāmi'*, kitāb al-Nikāh, vol. i, Chapter on Nikah al-Mut'ah, p. 133.

generally held to be not a very reliable one. The traditions also maintain that *mut'ah* on the occasion of the conquest of Mecca was made valid, impliedly by the silence of the Prophet, only for three days. The permission rather acquiescence stood abrogated or revoked thereafter. However, it becomes manifest from a minute study of the traditions that the last and final ordinance with respect to *mut'ah* being forbidden was promulgated in the year of the conquest of Mecca and 'Umar, during his *caliphate*, strictly enforced it. *Mut'ah* as such finds no support whatsoever either from the Qur'ān or Prophet's tradition for its validity.

Section 41. A marriage contract with a time-limit (*Nikāh al-Mu'aqqat*) is illegal.

Marriage for a period.

COMMENTARY

Nikāh al-Mu'aqqat or temporary marriage is that which is contracted, in presence of witness, with a woman for a fixed period of time. Such a marriage contract, according to Imām Zufar (a disciple of Abū Hanīfah), is valid but the condition of the fixation of time is void, because a vicious condition does not make the marriage contract itself void.

Zufar's Argument :

The limited period of marriage contract, in fact, has in it all the elements of *mut'ah* and should be held as void as *mut'ah*. Zufar however, for distinguishing the temporary marriage from *mut'ah* advances the argument that *mut'ah* is contracted by the word, *tamatu* i.e. "use", "usufruct" or "enjoyment," whereas temporary marriage is contracted by the word, "*nikah*" i.e. "marriage" contract; and secondly that *mut'ah* (like sale which is not effected without mentioning consideration) cannot be contracted without dower, whereas a temporary marriage can be contracted without mentioning the dower.

Conclusion :

In view of the present writer, this argument cannot be held as correct. Reliance, in such a matter, should be placed not on the words but on their intrinsic meaning. The real significance of such a marriage contract, on account of the fixation of the period, gets changed. Hence such a marriage contract cannot be regarded as valid. If, however, the fixed period in a marriage contract be of such a length as to encompass the life of the parties, it shall be considered to be a valid permanent marriage contract.¹¹⁹

¹¹⁹Ibn Hajr 'Asqalani : *Fath al-Bārī*, op. cit. (also see Sharḥ 'Ayni), "وروى الحسن عن أبي حنيفة أن الزوجين إذا وقتا مدة لا يعيش مثلها إليها صح النكاح لأنه في معنى الموبد".

Al-Marghināni: op. cit. vol. ii p. 293; Damād Āfandī: op. cit. vol. i, p. 331.

Section 42. A Civil Marriage which is not contracted in accordance with the tenets of *Shārī'ah* is a nullity.

COMMENTARY

A civil marriage is that which is contracted in accordance with and under some civil law in force in a country. Generally, the parties entering into a civil marriage declare that they do not profess any religion. Apparently, the contracting parties do not act according to *Shārī'ah*. Therefore, if the marriage does not fulfil the conditions prescribed by the tenets of Islam, it will be void.

Section 43. The re-marriage of the woman who has been the subject of *Li'ān* (imprecation) and separated from the husband on that account is prohibited with her ex-husband unless he has retracted from his oath and acknowledges himself to be the liar in that respect.

Remarriage
with imprecated
wife

COMMENTARY

It is an established rule in Islamic law that a husband, if he accuses his wife of adultery and he does not prove all the conditions as necessary by law for the proof of adultery i.e. four eye-witnesses, is liable to *hadd* punishment i.e. eighty lashes for falsely accusing his wife of unchastity.¹²⁰ But there may arise cases where the husband may have a strong belief about his wife's committing adultery with a man ; or where he has less than four eye witnesses of the adultery of his wife; or is certain that if he kills her, the people will kill him; or that if he accuses her, he will be liable to *hadd* for insufficiency of evidence; or that if he keeps quiet about it he will be in mental torture for the rest of his life and the marital relationship will become a sore for him; in all such cases, Islamic law provides that the spouses may perform *Li'ān* and be separated judicially on that basis.

Method of performing *Li'ān* :

The method of performing *Li'ān* is that the husband in presence of the official of the court ought to say four times, "I swear in the name of Allāh that I am assuredly true in what I say about the adultery of this woman. And at the fifth time the husband about himself ought to say, "Curse of Allāh be on me if I am untrue in the accusation of adultery that I have made against this woman". At the fifth time he ought to be pointing towards that woman. After this, the woman four times ought to say, I

¹²⁰Al-Qur'ān, Surah Al-Nūr, (The Light), xxiv: 4 :

”والذين يرمون المحصنات ثم لم يأتوا بأربعة شهداء فاجلدوهم
ثمانين جلدة“

swear in the name of Allāh that the husband is assuredly a liar. At the fifth time about herself the woman ought to say, "Allah's wrath descend on me if the husband is true in the accusation of adultery that he had made against me".¹²¹

Re-marriage :

The law further provides that such husband and wife who have separated by means of *Li'ān* will not re-marry, except that the husband acknowledges his accusation to be false. On his acknowledgement he will be awarded *ḥadd Qadhaf*, punishment of 80 stripes, for falsely accusing his wife of adultery. Thereafter, he may enter into a fresh marriage contract with his ex-wife, (if she is also agreeable). This is according to the view of Abū Hanīfah and Muḥammad Al-Shāybanī. Abū Yusuf, however, holds the view that they are debarred from re-marrying absolutely and for ever.¹²² The three *A'imma* (Al-Shafi'ī, Mālik and Ibn Hanbal) also agree with the latter view.¹²³ They rely on the tradition of the holy Prophet that the *Mutala'inayn* [those two (husband and wife) who did imprecate each other] shall never marry.¹²⁴ Abū Hanīfah and Muḥammad Al-Shaybānī are both agreed on the point that there remains no effect of *li'ān* after the husband has retracted. To this writer, the point of view of Abū Hanīfah seems to be sound. Abū Zuhra, a renowned modern scholar of Egypt also seems to hold this view as preferable.¹²⁵

Section 44. It is valid to marry a woman who is *muhramah*,
 Marriage with (the woman in the state of wearing *ihrām*)
 Muhramah for 'Umra or Hajj, but it is unlawful to cohabit
 with her in that state of *ihrām*.

¹²¹Al-Qur'ān, Surah Al-Nūr, (The Light) xxiv: 6 :

”والذين يرمون أزواجهم ولم يكن لهم شهادت إلا انفسهم فشهادة احدهم اربع شهادات بالله ، انه لمن الصادقين “-

Abu Da'ūd : *Al-Sunan*, Karkhana Tijarat Kutub, Karachi, 1369 A.H. Chapter on *Li'ān*, p. 305.

¹²²Al-Marghināni (d. 593 A.H.) : *Al-Hidayah*, Qur'ān Mahal, Karachi, vol. ii, p. 418-19 (Kitāb al Talāq).

¹²³Al-Shi'ranī, Abdul Wahāb : *Al-Mizān al-Kubrā*, Cairo, vol. ii, p. 127.

¹²⁴”والمتلاعنان لا يتكحان ابدا “-

¹²⁵Abū Zuhra ; *Aḥwāl al-Shakhsiyyah*, Cairo, 1957 A.D, p. 102 :
 ” اذا كذب نفسه ، فاذا فعل اقيم عليه حد القذف وعاد الرجل فيجوز ان يعقد عليها

من جديد “-

COMMENTARY

It is permissible for a Muslim to enter into a contract of marriage with a woman who has assumed the state of *iḥrām*.¹²⁶ It is reported by Ibn ‘Abbās that the Prophet married with Maymunah, while she was in the state of *iḥrām*.¹²⁷ It is, however, stated in *Nahr al-Fā’iq* that to marry a *muḥramah* (a woman in the state of *iḥarm*) is abominable to the degree of unlawfulness (*makrūh taḥrīmī*).¹²⁸

Conclusion :

To the present writer, the statement as contained in *Nahr al-Fā’iq* about such a *nikāh* being ‘abominable to the degree of unlawfulness’ can not be taken to be correct as one cannot imagine any such act on the part of the Holy Prophet. The statement may, however, be correct with regard to cohabitation in that state. There is consensus of opinion that the cohabitation by a man with his wife, during the state of *iḥrām*, is prohibited. In case of cohabitation taking place during the state of *iḥrām*, (whether he be a *muḥrim* or she, the marriage remains valid, although the *iḥrām* of either or both, as the case may be, shall become *fāsid* and the person shall be liable to the prescribed animal sacrifice in the way of Allāh, technically

¹²⁶*Iḥrām*, lit, “prohibiting.” The pilgrim’s dress for ‘Umrā and Ḥajj and also the state in which the pilgrim is held to be from the time he assumes this distinctive garb with the intention of ‘Umrā or Ḥajj, as the case may be, until he lays it aside. It consists of two pieces of unsewn cloth; one of these sheets termed *rida* covering the upper part of the body except the head, the right arm and shoulder. The other, called *izār*, is wrapped round the loins from the waist to the knee, and knotted or tucked in at the middle. In the state of *iḥram*, the male pilgrim is forbidden the following actions: connection with or kissing women, covering the head, using perfumes, hunting or slaying animals, anointing the head with oil, cutting the beard or shaving the head, washing the head or beard with marsh mallows, cutting the nails, plucking a blade of grass, cutting a green tree; although the pilgrim is not allowed to hunt or slay animals, he may kill the following noxious creatures: a lion, a biting dog, a snake or scorpion. For each offence against the rules of *iḥrām*, special sacrifices are ordained, according to the offence. As for women pilgrims, their *iḥrām* is to clothe their entire body, including their hands, feet and the head in a manner that no hair of it be visible. The face should, however, remain open or if shrouded in a veil, the veil should not touch the face. The other mandates relating to *iḥrām* are common to both.

¹²⁷Al-Ḥaṣkafī: *Al Durr al-Mutkhār*, vol. ii, Chapter “Nikāh al-Muḥarramāt.”

¹²⁸*Ibid*.

called "*Dam*" as an expiation (*Kaffārah*) to the breach of the terms of *ihrām*.

Section 45. The exchange marriages, *nikāḥ al-Shighār* are valid, but the condition of exchange, *Shighār* being void the customary dower of both the wives shall be incumbent on their respective husbands.

Exchange
Marriage

COMMENTARY

In pre-Islamic Arabia there was a custom of exchange of or reciprocal marriages, where one marriage used to be a consideration for the other. It was called *Nikāḥ al-Shighār* viz. a person used to contract the marriage of his daughter (or his sister) to another, on the other's bestowing his daughter (or sister) upon him, without fixing any dower, or anything in lieu thereof, for any of the women.

The question is whether such marriages are legal and valid? There is a difference of opinion among different schools of Islamic Law. According to Ḥanafi view, the marriages of both women are valid and each of them will get her customary dower, i.e. *Mahr al-mithl*. Mālikī view is to the contrary. They do not recognize such a marriage except if cohabitation has taken place. Imām Shāfi'ī also does agree with Imām Mālik but according to *Shafi'iyyah* school (in general) the stronger view is in line with that of Ḥanafis. Imām Ahmad Ibn Hanbal, too, is in agreement with Ḥanafi view. Among the *Tabi'īn* 'Ata' Zuhri, Laith, Ishāq Abu Thawr and Ibn-i-Jubayr, are also in accord with Ḥanafis.

The difference of opinion, in fact, has emerged from the interpretation of the saying of Holy Prophet, (peace be upon him) who is reported to have prohibited the *nikāḥ al-Shighār*, i.e. the exchange marriages 'without any dower'. The sayings of the Holy Prophet finds place in several books of the collections of *aḥadith*. Probably, the first, in point of time is, *Muwatta'a* of Imām Malik b. Anas (d. 179 A.H.). There it is reported thus :

"I was told by Yahya, who heard it from (Imām) Malik who heard it from Nafi', who heard it from Ibn-i-'Umar that the Prophet of Allah (peace be upon him) prohibited from *Shighār* and the *Shighār* is that a man marries his daughter on the condition that the other marries his daughter to him, (and) there is no dower between them (both)".¹²⁹

¹²⁹Imām Mālik (d. 179 A.H.) : *Muwatta'a* with commentary by Abū Abdullah, Muḥammad Abdul Baqi b. Yusuf Al-Zarqani (d. 1122 A.H.) Cairo, Vol. iv p. 31.

حد ثنی ، یحیی عن مالک ، عن نافع ، عن ابن عمر : ان رسول الله صلى الله عليه وسلم نهى عن الشغار ، والشغار ان يزوج الرجل ابنته علي ان يزوجه آخر ابنته ليس بينهما صداق -

This *ḥadīth* has also been stated by Imām Muḥammad al-Shaybani, one of the two most famous disciples of Imām Abu Ḥanīfah, in his book which is also named *Muwattaʿa*, with a difference that instead of the word *يزوج* the word *ينكح* has been used, which does not matter at all, as both the words carry the same meaning i.e. "one who marries". Imām Muḥammad, after quoting the said *ḥadīth*, says: "And from this, we deduce (the principle) that the marriage of a woman (in itself) does not become dower, when she is married on the condition that if that another man gives her daughter in marriage, then, it would become her dower. Therefore, the marriage is valid and for her is the customary dower according to the women of her family, and that is what Imām Abū Ḥanīfah has said and our jurists, in general".¹³⁰

The *ḥadīth* has been described in all the famous six books of the collections of *aḥādīth*. Imām Bukhārī (d. 256 A.H.) has narrated it from Abdullah b. 'Umar. Imām Muslim (d. 261 A.H.) has narrated the *ḥadīth* from Yahya. Imām Muslim has also stated this *ḥadīth* from Abu Hurayrah and Jābir b. 'Abdullah. The other four *aimmah* of *aḥādīth* i.e. Abū Daūd (d. 275 A.H.), Tirmizī (d. 279 A.H.), Nasā'ī (d. 303 A.H.) and Ibn Mājah (d. 273 A.H.), all narrate according to the chain of narrators of Imām Malik. It may, however, be mentioned that the *aḥādīth* on the subject have been reported from the Holy Prophet by Abdullah Ibn 'Umar, Abū Hurayrah and Jābir b. 'Abdullah.¹³¹

Reasoning :

As pointed out earlier, the difference is based on their interpretations. Imām Mālik attributes the prohibition to *Nikah al-Shighar* itself, while the Hanafis and Imām Ahmad b. Ḥanbal look upon it from the point of view of the condition of *Shighār*, in the marriage. In other words Imām Mālik says that such a *nikāḥ* is prohibited and, therefore, it is invalid. The Ḥanafis rule that in such marriages the marriage of one is not capable of being the dower for the other, because in such a marriage it is the uterus of another woman which is given in lieu of dower. Apparently, the uterus of one woman cannot be the dower for the other woman. She can neither have it nor use it. Moreover, it is under the direct control and use of that

¹³⁰Imām Muḥammad, Al-Sha'ybānī, *Muwattaʿah*, Published by Karkhānah Tijārat Kutub, Karachi, p. 241 :

وبهذا نأخذ لا يكون الصداق نكاح امرأة فإذا تزوجها على أن يكون صداقها أن يزوجه ابنته فالنكاح جائز ولها صداق مثلها عن نسائها لا وكس ولا شطط، وهو قول أبي حنيفة رحمه الله تعالى والعامّة من فقهاءنا

¹³¹Imām Muslim's *Ṣaḥīḥ* with commentary by Imām Nawawī, vol. ix, p. 200-201.

another man. Therefore, the condition is void, and the marriage is perfectly legal. But the customary dower will be payable by the respective husbands to their wives; such as, in the case of a marriage where wine or pig has been settled as dower, the marriage is not invalid itself because of the illegality attached to the dower, and the customary dower will be payable; or in another case, where the dower has not been settled at all, or it has been settled that no dower will be payable, in all these cases the marriage shall be valid, according to all schools of *fiqh*, and the condition, being *fāsid*, shall be void.

Pakistan View :

In the case of *Sher Mohammad v. Toti*¹³² of Quetta, his Lordship Mr. Justice A. R. Shaikh, Judge of the High Court of West Pakistan after quoting the above *ḥadīth* from an Urdu translation of *Saḥīḥ* of *Imām Bukhari*, has observed that:—

“The *ḥadīth* is clear on the subject and the view taken by the Ḥanafī Jurists does not appear to be sound when we find that the wisdom of the rule laid down by the Apostle of Allah was to do away with pre-Islamic custom of bartering away women-folk.”

Criticism :

With great respect it is submitted that, perhaps, the reasoning for the view of Ḥanafīs was not fully placed before his Lordship. Islam has undoubtedly reformed the pre-Islamic Society of Arabs; it did away with the custom of contracting marriages (exchange or otherwise) without dower. The payment of dower, in cash or kind, making a condition attached to the marriage itself was in order to give status and dignity to women-folk. It is an obligation imposed by the law on the husband as a mark of respect for the wife as is evident from the fact that the non-specification of dower at the time of marriage does not affect the validity of the marriage. The husband has to pay proper dower to his wife. The underlying principle of such marriage is that any condition which is repugnant to the contract of marriage is void. It does not invalidate the contract itself. In other words, a marriage with an invalid condition does not become invalid. The condition being illegal the marriage is operative, e.g. if a woman marries a man on the condition that there shall be no consummation of marriage and the man was to consent, the condition will be void and the marriage will be valid. In a case of Sind Chief Court, it was thus correctly held that consideration in marriage being illegal,

the marriage is not void on that account. The marriage is not a civil contract.¹³³

Justice Muhammad Gul of the West Pakistan High Court (as he then was) in the case of *Sardar Bano vs. Saifullah Khan*, without referring to Quetta case, however, observed, "No marriage between two Muslims constitutes a consideration for another marriage even though between close relatives of the parties to the first mentioned marriage. Each marriage is a covenant absolutely independent of the other, and must stand or fall on its own merits, without affecting the other marriage, though purporting to be by way of "Exchange" or "Watta Satta" call it what you like."¹³⁴

Conclusion :

To sum up, the view of the Hanafis in declaring the condition of the *Shighār* as illegal, instead of nullifying the marriage itself, is more near to reason and in line with the meaning and spirit underlying the *ḥadīth* as understood by the Companions of the Holy Prophet, and the Successors (*tabi'īn*) and acted upon by the great majority of the Muslim world throughout.

Section 46. Jactitation of Marriage is a false pretence of being married to another.

Jactitation of Marriage

COMMENTARY

Jactitation, in legal terminology, is a false assertion of one's right, title or interest (which is made with a view of ignoring other's right, title or interest).¹³⁵ Jactitation of marriage is, thus, a person's false pretence of being married to another; that the marriage of that person (man or woman) has been contracted with another person (man or woman). The latter may bring a suit for declaration and injunction that there is no such marital relationship between the latter and the former, and that the person concerned be restrained from making or repeating the said false assertion of marriage with the latter.¹³⁶

Law in Undivided India :

If a man or woman falsely claims to be the husband or wife of another person, the proper remedy is to bring a suit for declaration that the parties

¹³³AIR 1928 Sind p. 22.

¹³⁴PLD 1969 Lah. 448 ; PLR 1969 Lah. 108-21; DLR (WP). 115; PLR 1970 (1) W.P. 743).

¹³⁵Tanzil-ur-Rahman, Dr : Qānūnī Luḡhat, (Law Lexicon) 3rd. ed. Lahore (See Jactitation).

¹³⁶Ibid : See Jactitation of marriage.

are not married. Such an action will lie between Muslims in India. It was thus held in the case of *Mir Azmat Ali Vs. Mahmud-un-Nisa* : "There can be no doubt that unless a man is entitled by means of the Civil Court to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardships and his heirs may be harassed by false claim after his death."¹³⁷

Pakistan Law—Modern Legislation :

Under the West Pakistan Family Courts Act, 1964 the jurisdiction to try suits for jactitation of marriage has been conferred on the Family Courts.¹³⁸ Lahore High Court in several judgments has also given its judicial finding on this point. It is thus stated in the judgment of Mr. Justice Aftab Husain : "A suit for declaration that the defendant is not the husband or wife of the plaintiff but that the defendant alleges to be the wife or husband of the plaintiff, is a suit for jactitation of marriage. Such a suit falls under the category and could, therefore, be filed only before a Family Court."¹³⁹ In another case it was held by the same Judge that "The term "jactitation" cannot be confined to a suit for declaration that there was no marriage. In a suit by a plaintiff, who denies the marriage, the declaration of the civil Court would be effective to silence the defendant. Similar consequences would follow if a suit for declaration about the existence of marriage is dismissed on the ground that there was no marriage at all or there is no subsisting marriage. Such decree is as effective in silencing the plaintiff as a declaratory decree obtained to silence the defendant. Therefore a suit in the latter form is equally a suit for jactitation which would fall within the exclusive jurisdiction of Family Court."¹⁴⁰

Effect of Court's Decree :

It is stated in *Al-Hidayah* that if a woman claimed against a man that he had married her and produced witnesses in support of her claim and the Qaḍi, believing those witnesses, decreed her claim and granted declaration in her favour, although she was not, in fact, married to that man, then according to the view of Imām Abū Hanifah and to the earlier assertion of Imām Abū Yūsuf the man may cohabit with her (as his wife), whereas according to the Imām Muḥammad and latter view of Imām Abū Yūsuf the man should not cohabit with her.¹⁴¹

¹³⁷(1897) 20, Allahabad p. 96-97.

¹³⁸See Schedule appended to the Act.

¹³⁹PLD 1974 Lah. 105 ; Law Notes 1973 Lah. 635.

¹⁴⁰PLD 1974 Lah. 78.

¹⁴¹*Al-Marghīnānī* : *Al-Hidayah*, Qur'ān Mahal, Kitab al-Nikah, vol. ii, p. 313.

The present writer finds himself in agreement with the view of Imām Abū Hanifah in as much as the decree of the Court is effective and operative so as to determine the relationship of the man and the woman as husband and wife. In other words, the nikāh existed by virtue of that decree, which, however, must be based on legal and proper evidence, provided the marriage contract between that man and woman is otherwise lawful. The wrongdoers will, however, be answerable before Allāh. It may, however, be clarified that the view of the present writer is based on judicial considerations, (قضاء) otherwise, between God and man, (ديانة) the parties are not the wife and husband, and as such cohabitation should not take place ; but if it takes place, then, all the effects of a valid marriage shall be attracted to such union and cohabitation.

CHAPTER—V

Guardianship in Marriage

Section 47. A minor boy and a minor girl may, with the permission of a Family Court having jurisdiction, be contracted into marriage by their guardians.

Marriage of
minors

The right of guardianship over a minor ends with the attainment of the ward's majority.

COMMENTARY

The four Imāms of the Sunnīs agree on the point that the minors may be contracted into marriage by their guardians. The act of the Holy Prophet of marrying with 'Āishah during her minority is cited in proof of the lawfulness of the marriage of minors.¹ The Shi'ah jurists are also in agreement with Sunnīs on this point.^{1a}

Various Contentions :

As against this, Imām Shubramah, a contemporary of Imām Abū Ḥanīfah and a famous jurist of Irāq, and Abū Bakr al-'Āsim, a Qāḍī, have forbidden the contracting of marriage of minor boys and girls. According to them the marriage, in accordance with the biddings of Allāh, should be contracted when they attain the marriageable age (puberty). They argue that if marriage contract had been lawful before the minor's attaining the age of puberty, there could be no need of the Qur'ān's, saying “حتى إذا بلغوا النكاح” “Until they reach the age of marriage.”^{1b}

The other argument advanced against the lawfulness of the minors' marriage is that a marriage is based on necessity and a minor is under no necessity for contracting marriage. The purpose of marriage contract is the fulfilment of natural passion and also lawful procreation. The minor, having no power of carrying out either of the two purposes, is under no necessity for contracting marriage.

The third argument advanced against the lawfulness of a minor's marriage is that the provisions of law relating to marriage and its incidents become

¹Al-Sarakhsi : Al-Mabsūt, op. cit. vol. iv, p. 212.

^{1a}Under *Shi'ah* Law, Marriage with the consent of girl's grandfather but without her own consent, she not having attained puberty at the time of marriage, is valid. (AIR 1924 All 870 ; 22 ALJ 423 ; 79 Ind. Cas. 907).

^{1b}Al-Qur'ān, Surah Al-Nisa', (The Women) IV : 6.

applicable after the minor's attaining puberty. The marriage of minors, therefore, is unwarranted.

The jurists who are convinced of the lawfulness of a minor's marriage rely, besides the tradition relating to 'Āishah, on the following reports from the Companions of the Holy Prophet :—

1. Qudāmah b. Māz'ūn had contracted his marriage with the daughter of Zubayr on the day she was born and had said that, in the event of his death, she would be his heir.
2. The second Caliph, 'Umar contracted the marriage of his minor daughter with 'Urwah b. Zubayr.
3. 'Urwah b. Zubayr contracted the marriage of his niece with his nephew and both of them were minors.
4. A person made a gift of his minor daughter to 'Abdullah b. Hasan. 'Ali held it to be valid.
5. A woman herself married 'Abdullah b. Mas'ūd and contracted the marriage of her minor daughter (who was from her former husband) with Musayyib b. Nuḡbah. 'Abdullah b. Mas'ūd held it to be valid.

The jurists who are convinced of the lawfulness of the minor's marriage contract quote, besides these precedents, the following verse from the Qur'an as well :—

“Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubt, is three months, and for those who have no courses (it is the same).”²

This verse of the Qur'an lays down the period of probation of those divorced women whose menses due to advanced age have stopped completely as well as of those women whose menses due to minority have not yet commenced. They further contend that the legal basis of and the occasion for a term of probation arises only because of a valid marriage contract. Had the marriage contract of a minor been invalid where was the occasion for indicating the term of probation after divorce in the case of the minor (wife).

Imām Sarakḥsī, in connection with the verse, “حتى اذا بلغوا النكاح” referring to a tradition reported by 'Āishah writes, “The word “*Nikah*”

²Al-Qur'ān, Surah Al-Talaq, (The Divorce) LXV : 4,

والأئى يئسن من المحيض من نساءكم ان ارتبتم فعدتوّن ثلاثة اشهر والأئى لم يحضن ط

means "*Iḥtilām*" "(physical maturity)".³ According to him, therefore, the said verse (IV : 6) cannot be cited against the lawfulness of minor's marriage contract. The context of the verse, as a whole, supports the contention of Imām Sarakhṣī, as it refers to the time for releasing the property of minors to them.

So far as the point of the marriage contract of minors being unnecessary is concerned it may be said that out of the several expedient conditions of marriage one is the equality of social status of the man and woman. This purpose is not so well served by any other means as by marrying within the kith and kin. Such a match may not always be easily available. If the guardian waits for his ward to attain majority the opportunity of having a kindred there available may in the meantime disappear. Thus, the necessity of marrying him even during his minority may arise. The necessity of marriage during minority thus being there, the exigency of a guardian may also arise.

Indeed, in view of the present day emphasis on safeguarding minors' interests, the Family Courts should be so empowered that the interest of the minors be protected from whatever social complications may arise on account of a minor's marriage. For, in any case, the ascertainment of congeniality of temperament depends on the parties having reached proper age for understanding things and the marriage may be dissolved even between kith and kin; the reference to the Court may provide a safeguard in the interest of parties.

Age of Majority in Pakistan :

Under the Majority Act of 1875 minority ceases on the completion of eighteen years. Section 2 of the said Act, however, makes an exception in matters relating to marriage, dower, adoption and divorce. Thus it is held "for the purpose of marriage the rule of Muslim Law must apply in the instant case. According to which any person, who has attained puberty, is entitled to act in the matter of marriage on attaining the age of 16 years. [1971 P Cr L J 523 (Lah.); Law Notes 1970 Lah. 393]. Child-marriage in Pakistan has been totally forbidden.

Conclusion :

The question of child marriage basically is a social problem. This problem instead of being looked at from purely religious point of view should equally be examined in the context of present day society. The fact that should be borne in mind is that the contracting of marriage of the minors is not compulsory; it is just permissible. The Head of State or the Legislative Body of a country may, in the larger interests of the society, suspend or

³Al-Sarakhṣi : *Al-Mabsūt*, vol. iv, p. 212.

restrict it. This, however, never means that the Head of State or the Legislative Body may act only when it considers such a marriage contract to be illegal. It rather means that the Head of State or the Legislative Body may do away with it in the interest of the society and put a stop to social evils that might emanate otherwise. Islam recognises the right of the highest authority of the State to frame laws for the purpose. The Sovereign is empowered to suspend or restrict some actions or acts, that are in themselves permissible (mubāḥ) but within the framework of divine law. He is also empowered, in certain cases, to issue prohibitory orders.⁴ For instance, during the period of second Caliph 'Umar, due to famine, the punishment of chopping off the hands of thieves in certain cases was suspended. Similarly he had forbidden giving zakāt to *Mu'allifat al-Qulūb*. He had also forbidden Hudhayfah b. al-Yamān from keeping his Jewess wife in marriage due to the apprehension, on political and social grounds, that Muslims may get themselves involved with *ahlal kitāb* women of loose character. Among other eminent jurists too the discussion on the problem had been in the light of its permissibility and not in the light of its being incumbent based on tradition. During earlier times too full importance used to be given to the social demands of the relevant period.

Suggestion :

The contracting of a minor's marriage is under the law, as in force in Pakistan, forbidden and is punishable as an offence. In the view of the present writer, totally banning or forbidding the minor's marriage contract is against the spirit of the *sharī'ah* as well as comprehensiveness of that law. It is, therefore, advisable that suitable amendments be made in the law in force and the contracting of minor's marriage be permitted. In view of certain exigencies the granting of the permission for such marriages may be left to the discretion of the family courts. Such a proviso has been introduced in the laws in force in other Muslim countries as well (e.g. Sudan, see *infra*). Accordingly, if a boy or a girl attains puberty but does not attain the age fixed by civil code for marriage contracts they must obtain the requisite permission from the court of a Qāḍī. In connection with *rukhsatī* (consummation), however, a suitable age may be fixed, say 18 years in case of a boy and 16 in case of a girl, as now in the case of marriages.

Modern Legislation :

Sudan :

Under the Circular No. 54 of 1960 a girl who has not attained puberty is not to be contracted in marriage. It is maintained that this provision

⁴Damad Afandi ; *Majma' al-Anhur*, Kitāb al-Qaḍā, vol. ii p. 150 ; Shah Waliullah : *Hujjat Allāh al-Bālighah*, Delhi, vol. ii, p. 112 ; Ibn Khuldun : *Lubab al-Mahal*, p. 127.

would as effectively prohibit child-marriage in Sudan as express legislation could do. [See Anderson : 'Modernization of Islamic Law in Sudan', Sud. L. Jour. & R. (1960) 302.] The Qāḍī may, however, permit the marriage of a girl who has completed ten years of age, if immorality is feared on her part. The conditions on which the Qāḍī can give such permission are that the bridegroom should be acceptable to her and that there should be social equality (*Kāfā'at*) between the spouses. Besides that the amount of dower and the *jahez* (household articles given to the bride) should be reasonable. (Article 8).

Section 48. Every major and prudent Muslim who, according to *Sharī'ah*, is entitled to become a guardian of the ward may also act as guardian in a marriage contract.

Explanation : An apostate or a non-Believer can not act as guardian of a Muslim.

COMMENTARY

There is consensus of opinion on the point that a guardian must be prudent, major and a Muslim. An insane or a minor has no power over himself and is legally not authorised to act in his own affairs. He, therefore, cannot act as guardian in the affairs of others.

Guardian must be Muslim :

So far as the condition that a guardian of marriage must be a Muslim is concerned, all the Doctors of *fiqh* agree on it. A non-Believer, therefore, cannot act as guardian of a minor Muslim boy or girl. The basis of this proposition is that right of inheritance is the basis of guardianship and it is stated in a tradition. "People belonging to two different Faiths cannot inherit from each other"⁵ By "Two Faiths" (*Millatayn*) is meant Infidelity (*Kufr*) and Islam. Hence, an infidel cannot be the guardian of a Muslim. The Qur'ān also forbids the guardianship by a non-Believer of a Muslim under the verse, "And never will Allah grant to the Unbelievers a way (to triumph) over the Believers"⁶ and "O ye who believe !

⁵ " لا يتوارث اهل ملتین "

⁶ Al-Qur'ān, surah *Al-Nisā* (The Women), IV : 141,

ولن يجعل الله للكافرين على المؤمنين سبيلا -

Take not for protectors your fathers and your brothers if they love infidelity above Faith ; If any of you do so, they do wrong.”⁷

This principle, according to a consensus of the jurists, also holds good in relation to evidence and inheritance matters as well.⁸ These injunctions apply in respect of an apostate’s guardianship also. His right of contracting a minor’s marriage is suspended on account of his being an apostate till he repents and turns back to Islam.^{8a}

Indo-Pakistan Law :

In pre-partitioned Indian Act XXI of 1850 it is laid down that no law or custom shall deprive any person of his rights or property on his renunciation of his religion. As guardianship also is a right, this right, too, on the renunciation of religion, under that law in force cannot be affected. On account of this exception made by law as in force in Indo-Pak sub-continent for over a century, the High Court of Bengal in 1866, in the case of *Machu Vs. Arzoon*, held that a Hindu father on account of accepting the faith of Christianity cannot be deprived of the custody of his children and of taking care of their education.⁹ In a subsequent case, however, the same High Court without referring the case of *Machu Vs. Arzoon*, held that a Muslim father who had become a Jew was not entitled to give his daughter in marriage because of his apostasy.¹⁰ In a third case, the Bombay High Court followed the case of *Machu Vs. Arzoon* and held that Hindu on being converted to Islam is not deprived of his right to give his son in adoption to another Hindu.¹¹ The Chief Court of Punjab also followed the case of *Machu* and in respect of a Muslim father who had become a Christian convert held that on account of apostasy the father cannot be deprived of his right of guardianship of the person and property of his minor children.¹² Act XXI of 1850 is in force in Pakistan also.

⁷Al-Qur’ān, surah Al-Tawbah (Repentance), ix : 23,

يا ايها الذين آمنوا لا تتخذوا آباءكم و اخوانكم اولياء ان استحبوا الكفر على الايمان ومن يتولهم منهم فاولئك هم الظالمون -

⁸Ibn Humam : Fath-al-Qadir, vol, ii, p. 412; Ibn Nujaim: Bahr al-Raiq, vol. iii, p. 136; Ibn al-Ābidin : Radd al-Muhtar, vol. ii, p. 320.

^{8a}Hedayah : (Eng. Tr. by Hamilton), Chapter on Agency, p. 392, (Arabic) Qur’ān Mahal, Karachi, Karachi p. 193.

⁹(1866) 5 Weekly Report 235.

¹⁰In re : *Mahan Bibi*, (1874) 13 Bengal Law Report, p. 160.

¹¹*Sham Singh v. Sānta Bai* (1901) 25 Bombay, p. 551.

¹²*Gul Mohammad v. Mst. Wazir* (1901) 36 Punjab Record, p. 191.

Qur'anic Injunctions :

Islam does not hold the guardianship of infidels and apostates over a Muslim as valid. In this respect, there are, several verses in the Holy Qur'ān. For instance :

- (i) "Let not the Believers take for friends or helpers unbelievers rather than believers ; if any do that, in nothing will there be help from Allah.¹³
- (ii) O' Ye who believe ! take not the Jews and the Christians for your friends and protectors. They are but friends and protectors to each other. And he amongst you that turns to them (for friendship) is of them.¹⁴
- (iii) But those who reject Faith—after they accepted it, and then go on adding to their defiance of Faith,—Never will their repentance be accepted ; for they are those who have (of set purpose) gone astray).¹⁵
- (iv) "They but wish that ye should reject Faith, as they do and thus be on the same footing (as they), but take not friends from their ranks until they flee in the way of God (from what is forbidden). But if they turn renegades, seize them and slay them and (in any case) take no friends and helpers from their ranks.¹⁶

Conclusion :

The above noted verses go to prove the fact that friendship should not be extended to the Jews and the Christians. Likewise there is a commandment of God against contracting friendship with an apostate, rather instead to kill him outright. How, in the circumstance, the guardian-

¹³Al-Qur'ān, surah *Al-i-Imran* iii : 28,

” لا يتخذ المؤمنون الكافرين أولياء من دون المؤمنين ومن يفعل ذلك فليس من الله في شيء .. “

¹⁴Al-Qur'ān, surah *Al-Mā'idah* (The Table spread), V : 54,

يا أيها الذين آمنوا لا تتخذوا اليهود والنصارى أولياء، بعضهم أولياء بعض، ومن يتولهم منكم فإنه منهم -

¹⁵Al-Qur'ān, surah *al-i-Imran* : (The Family of Imran), iii, 90,

ان الذين كفروا بعد ايمانهم ثم ازدادوا كفراً لن تقبل توبتهم واولئك هم الضالون -

¹⁶Al-Qur'ān, surah *Al-Nisa'* (The Women), IV : 89,

ودوا لو تكفروا كما كفروا فتكونون سواء فلا تتخذوا منهم أولياء حتى يهاجروا في سبيل الله، فان تولوا فخذوهم واقتلواهم حيث وجدتموهم ولا تتخذوا منهم ولياً ولا نصيراً -

ship of a non-Muslim or of an apostate over a Muslim can be tolerated ? Moreover Islam being superior compared to other religions how can its adherents be subjected to the guardianship of a believer in other faiths or of an infidel ? Hence the guardianship of a non-Muslim over a Muslim is not valid.

Suggestion :

The Qur'ānic verses in respect of the non-domination of non-believers and apostates over Muslims demand by implication that the apostate should have no right of guardianship over a Muslim. The fact that a Muslim father after becoming an apostate has or has not the right to get his minor children contracted into marriage is simply a question respecting the guardianship in marriage contract. This ought to be the concern of Muslim Personal Law. In pursuance thereof it appears to be necessary that suitable amendments be made in the existing law, Act 21 of 1850 so that no uncertainty may remain there.

Modern Legislation :

Sudan :

It has been provided in Article 2 of Circular No. 54 of 1960 that a person acting as guardian in marriage must be an adult male, a Muslim and sane. If a person entitled to such guardianship does not fulfil any of these requirements, the right shall, then, pass to the next person in order prescribed by law.

Jordan :

Article 8 of the Jordanian law provides that the person acting as guardian in marriage must be legally responsible (*mukallaf*).

Section 49. The authority of getting the minor son or minor daughter contracted into marriage belongs consecutively to the following persons :—

The right of
guardianship

1. Father ; 2. Grand father (howsoever high in degree); 3. Full brother ; 4. Uterine brother; 5. Full brother's son ; 6. Uterine brother's son , 7. Father's full brother ; 8. Father's uterine brother ; 9. Father's full brother's son ; 10. Father's uterine brother's son and other paternal relations in the order of inheritance ; 11. Mother ; 12. Son's daughter ; 13. Daughter's son's daughter ; 14. Grandson's daughter ; 15. Daughter's grand daughter ; 16. Full sister ; 17. Step brother ; 18. Step sister; 19. Mother's other relations in the order of inheritance ; 20. The Ruler or Qāḍī.

COMMENTARY

There is some difference of opinion among the jurists with regard to relations who are entitled to the right of guardianship in marriage. In the order of priority also they are at some variance.

Hanafi View :

According to Ḥanafīs one who can basically act as guardian is the person who is ‘*asbah-binafsihī*’ i.e. an agnate (residuary) in his own right, a relative of the ward without an intervening female in relationship. In case there is no ‘*Asbah*’ available the *dhawil-Arḥām*, the uterine relations, (through mother) shall have the right of getting the minor boy or the minor girl contracted into marriage. When no relatives of the ward be available the *Qāḍī*, like other guardians, can get the minor contracted into marriage, provided this right has been conferred upon him by the Ruler, otherwise the right of guardianship in marriage would belong to the Ruler himself.¹⁷

Imam Malik’s View :

According to Imām Malik nobody except the father has the right of getting the minor boy or the minor girl contracted into marriage.¹⁸ When there is no father the right of guardianship shall get transferred to the executor or the *Qāḍī*.¹⁹ According to the Hanafis the executor who is not the heir cannot also be the executor for the purposes of marriage contract, though the deceased father may have appointed him guardian through his will.²⁰

Shafi’is View :

Then, according to Al-Shafi’i except the father and the grand father nobody else has the right of guardianship in marriage.²¹

The Shi’i View :

The Shi’ahs, on this point are in agreement with Al-Shafi’i. According to them too, only the father and the grandfather have the right of guardianship in marriage²² and no other relative has that right. In the event of

¹⁷Al-Sarakhsī : *Al-Mabsūt*, vol. iv, p. 192-193 ; Ibn al-Nujaim : *Bahr al-Raiq*, vol. iii, p. 133 ; Ibn al-‘Ābidīn : *Radd al-Muḥtār*, vol. ii, p. 319 ; Ibn al-Humam : *Fath al-Qadir*, vol. ii, p. 405-414.

¹⁸Al-Sarakhsī : *Al-Mabsūt*, vol. iv, p. 213.

¹⁹Amīr ‘Alī : *Jami ‘al-Ahkam fiqh al-Islam*, Lucknow, vol. i, p. 152.

²⁰Ḥaskafī : *Durr al-Mukhtār*, on the margin of *Radd al-Muḥtār*, vol. ii, p. 322.

²¹Al-Sarakhsī : op. cit. p. 214. Ibn al-Qudamah : *Al-Mughnī*, vol. iv, p. 389.

²²Al-Hillī ; *Sharāṭ al-Islam*, Tehran, p. 173.

there being no father or grandfather the right of guardianship in marriage shall get transferred to the Executor or the Ruler.

Conclusion :

According to the present writer, the viewpoint of the Hanafis is based on a deep study of human psychology, and compared to other schools of law is more practicable. The reason is that the guardianship of person of the minor like that of property is a distinct right which is entirely based on relationship. A guardian the closer he is in relationship with the ward the more affectionate will he be towards him. The principle is that special guardianship is weightier than general guardianship. The view of Mālik, Shafi'ī and the Shi'ah that after father and grandfather the right of guardianship in marriage vests in the Executor, Qāḍī or the Ruler cannot be held beneficial to the ward on the ground that the position of a Qāḍī or the Ruler comes, in affinity after the other related guardians. The assumption that the Qāḍī or the Ruler, in the presence of the guardian, cannot act as guardian of a minor boy or minor girl, is based on the fact that a Qāḍī or a Ruler cannot protect the interest of his ward in the manner in which a guardian, on account of his blood relationship, can. On the basis of this argument, it may be more correct to say that only in the event of there being no blood relatives a Qāḍī or someone on behalf of the Ruler of the State may act in a minor's marriage as his guardian.

Indo-Pakistan View :

Consent of guardian of minor girl essential:—"A ceremony of marriage performed between a Muhammadan adult and a minor Muhammadan girl would, however regular in other respects, be ineffectual to create a valid marriage unless the guardian of the minor had previously consented to the marriage, such consent being essential. When the marriage of a Muhammadan girl alleged to be a minor with a Muhammadan adult is questioned on the former's behalf, it is incumbent on the latter to establish by legal evidence either that the marriage was contracted with the consent of the girl's lawful guardian or that the girl having reached her majority herself consented to the same."

"Neither under the Muhammadan Law nor under any statutory enactment has the maternal grandmother of a Muhammadan minor, any preferential right to take charge of the minor as against the minor's paternal uncle. Under the Muhammadan Law, after the death of the father, the daughter can be given in marriage by the paternal uncle only and when there is a paternal uncle, the maternal grandmother cannot give the daughter in marriage even if authorised by the paternal uncle, or by the terms of a will of the father." (AIR 1916 PC 250 : 6 LW 26 : 21 CWN 345 : (1917) MWN 261 : 10 Bur LT 79 : 36 Ind Cas 20).

Criticism :

These authorities, it seems, lay down a rule that a minor girl can herself contract her marriage if it is previously consented to by her guardian. Under the law, a marriage is not contracted by a minor. In fact the guardian should, either himself or through some authorised agent, give the minor into marriage. Further, it is not correct to lay down a rule that after the death of the father, the daughter can be given in marriage by the paternal uncle *only*. Her grandfather and brother have preferential rights than that of a paternal uncle i.e. the father's brother, in case the ward is a Hanafi.

Modern Legislation :**Sudan :**

In Sudan, it has been provided in Circular No. 54 of 1960 that the Mālikī order of priority for guardianship in marriage shall normally be followed. [Article 3 (a)]

Jordan :

In Jordanian Law the guardianship in marriage is confined to the relations of the ward who are 'agnates in their own right' ('asbah bi nafsihī) i.e. the Hanafīs' order. (Article 7).

Syria :

In Syria it is provided that the guardian in marriage shall be one of the 'agnates in their own right' in the order of right to inheritance, provided he and the ward are within prohibited degrees of marriage. (Article 21). There, too, the Hanafi order of priority is followed.

Section 50. In presence of a near guardian, the guardianship right of a remote guardian becomes extinct. In *ghibat al-Munqatah* (established absence) of the near guardian, however, the remote guardian shall be entitled to get the ward contracted into marriage.

Right of a remote guardian in presence of a near guardian

COMMENTARY

All are agreed on the point that the nearer guardian excludes the right of guardianship of a guardian more remote.²³

Hanafi View :

According to Muhammad al-Shaybani, if a remote guardian gets a minor contracted into marriage in presence of a nearer guardian, the

²³Hamilton's Hedaya: (Eng. Tr.), p. 37, (Arabic), op. cit. Qur'ān Maḥal, Karachi, p. 314 ; Ibn al-Ābidin : op. cit. vol. ii, p. 322 ; Ibn al-Nujaim : op. cit. vol. iii, p. 135.

marriage shall remain suspended till the permission of the nearer guardian is obtained, as a remote guardian himself has the status of a stranger in the presence of a nearer guardian.²⁴

Al-Shafi'i's opinion :

Al-Shafi'i is of opinion that if the guardian is not present, the Ruler shall get the marriage of the ward performed. Imam Zufar maintains that no one should get the ward's marriage contracted till the nearer guardian does not make his appearance. Shafi'i argues that the acquisition of guardianship rights by a remote guardian is not possible in presence of the nearer guardian. Therefore, the right of guardianship for averting the hardship to the ward vests in the Ruler and he becomes entitled to get the minor boy or minor girl contracted into marriage. Zufar argues that the remote is excluded by the nearer and the right of guardianship of the nearer, inspite of his absence, remains intact and is not terminated quite in the same manner as by absence the right of inheritance is not lost. The right of guardianship of the nearer guardian, inspite of his absence, remains intact. Likewise, the right of the Ruler to become a guardian is created only when there is no remote guardian at all and the right of the remote guardian is created when there is no near guardian. Thus in the presence of the nearer guardian the Ruler has no right of guardianship. If the nearer guardian is not hostile and is on a journey, the Ruler cannot replace him because of mere physical absence.²⁵

Abū Ḥanīfah and other Hanafi Doctors are of the view that if the nearer guardian is absent and the absence be of established nature the remote guardian shall have the authority of getting the ward contracted into marriage. They argue that in the event of the conclusive absence of the nearer guardian, though his guardianship does not come to an end, it assuredly gets suspended in as much as he is unable to use his right of guardianship and because of his inability, the remote guardian gets the right of the performance of the ward's marriage contract.

Ghibat al-Munqata'h :

Which absence shall be called the *Ghibat al-Munqata'h*, (established or conclusive absence) is an important question. In terms of *fiqh* generally one year's travel distance (on foot) is considered to be established absence. Some of the jurists maintain it to be a distance of a journey of three days (day and night). This view has been adopted by one of the latter groups. According to some other jurists for the purpose of the order respecting guardianship in marriage contract only so much travelling distance is an

²⁴Al-Sarakhsi : op. cit, vol. iv, p. 220.

²⁵Ibid.

accepted absence as is necessary for shortening the offering of prayers (*Qaṣr*) and there is on this view a consensus of juristic pronouncement. According to some, the absence of such an absentee guardian shall be considered conclusive who cannot be heard of during the time a suitable intending spouse can be reasonably expected to wait. In other words, the distance is to be calculated by the possibility of losing a present suitable match while inquiry is made for the opinion of the absent guardian. This view is held to have general approval and preference.

Conclusion :

In the present day world, when the old month's and year's distances are traversed within a few hours and days, what the "conclusive absence" is, has to be decided according to the circumstances in each case. The principle of "conclusive absence" has to be applied not merely on distances and remoteness but in all those causes also on account of which the nearer guardian is unable to exercise his right. Therefore, when the nearer guardian is unable to exercise his right, for instance, in case of his serious illness or imprisonment or hiding on account of other reasons or on his being at such a far off place that by the time he arrives, or by the time his consent is obtained the chances are that a suitable match shall be lost, the remote guardian shall be entitled to get the marriage contract performed and such marriage contract shall be valid.

Modern Legislation :

Sudan :

Art. 3. (a) The Mālikī order of priority for guardianship in marriage shall normally be followed.

(b) If a girl has no guardian or if the guardian is far away or is unreasonably opposing the girl's wishes, the Qāḍī shall act as the guardian, provided that there is no legal impediment to the marriage.

(c) Where no Qāḍī is available at a place, any Muslim can act as the guardian.

Art. 4. If a girl is contracted into marriage by a person under clause (c) of article 3 above in spite of the fact that any of her guardians could be easily contacted and consulted about the marriage, the contract shall be ineffective.

Art. 5. (a) If either of two guardians who have equal rights has consented to the marriage, the requirement as to the guardian's consent shall be deemed to have been complied with.

(b) If the nearer guardian refuses to conclude the marriage contract and a remoter guardian has done so, the marriage shall be valid.

(c) If a nearer guardian who is entitled to be consulted about the marriage is absent and it is feared that lapse of time may result into loss of a good bridegroom, a remoter guardian may act and his consent will be valid.

Morocco :

Art. 13. Where the guardian neglects to contract the ward into marriage, the Qāḍī shall ask him to do so, and if he refuses to do so, the Qāḍī himself can give her in marriage with a person who is her 'equal' on a proper dower.

Syria :

Art. 23. Where a nearer guardian is absent and the Qāḍī realizes that if his opinion is awaited for some time the benefit in the marriage may be lost, he can transfer the right to the next person in order.

Art. 24. The Qāḍī shall be the guardian of a person who has no guardian.

Section 51. If a remote guardian gets contracted the marriage of the minor in the presence of a nearer guardian that marriage for its lawfulness shall depend upon the permission of the nearer guardian.

Marriage by the remote guardian in presence of the nearer guardian.

COMMENTARY

If the minor's marriage is got contracted by the remote guardian in presence of the nearer guardian the marriage contract shall not be void. It will, for its lawfulness depend, on the permission of the nearer guardian.²⁷ If the nearer guardian gives his permission, it will become valid ; otherwise it shall remain invalid. The formulation is based on the principle of "Marriage by Unauthorised Person" i.e. if an unauthorised person gets some one contracted into marriage, the marriage contract (for its lawfulness) shall depend upon the permission of the rightful person.

Section 52. If there are two guardians of the same degree and one of them gets the ward contracted into marriage, it shall be fully valid.

Effect of marriage contracted by one of the two guardians of the same degree.

²⁶Ibid, pp. 192-212 ; Qāḍī Khan : Fatawa, Mustafāī Press, Delhi, vol. i, p. 166 ; Ibn al-Humam : op. cit. vol. ii, p. 416 ; 'Ubaydullah b. Mas'ūd, *Sharh al-Wiqayah* : Delhi, vol. ii, p. 27.

²⁷Al-Sarakhsī : op. cit., p. 220 i Ibn al-'Ābidīn : op. cit. p. 323.

COMMENTARY

If a minor girl has two full brothers and one of them gets her contracted into marriage, it shall be valid.

Some *‘Ulamā*, however, say that in such an event it is not proper for one of the guardians alone to get his ward contracted into marriage. They both should jointly get their ward contracted into marriage. They argue that the brothers are the substitute of the father, hence for the marriage contract to be effective both the brothers must be joint sponsors.

But the consensus of opinion is on the first noted opinion that the marriage got contracted by one of them is valid. The reason is that the basis of guardianship is the relationship and relationship cannot be divided into parts. Hence, if any one of the two gets the marriage contracted, the same shall be valid. In the case of two real brothers, the complete attribute of relationship is inherent in each of them, which is indivisible. Hence, each of the two brothers individually, properly and fully represents his father,²⁸ in his own exclusive capacity and the marriage of the minor contracted by him will be quite valid.

Modern Legislation :*Sudan :*

In has been provided in article 5 (a) of Circular 54 of 1960 of Sudan, "If either of two guardians who have equal rights have consented to the marriage, the requirement as to the guardian's consent shall be deemed to have been complied with."

²⁸Al-Sarakhsī : op. cit. p. 218-219 ; Ibn al-Ābidin : op. cit. p. 323 ; Ibn al-Humam : op. cit. p. 417.

CHAPTER—VI

Equality in Marriage (*Kafā'at*)

Section 53. For the purpose of marriage that person is deemed to be one's *Kufw* (social equal) who has the same religion, status of freedom and similar rated lineage, profession, financial standing and character.

Definition of
Equal (*Kufw*)

COMMENTARY

Literally the word *kafā'at* means equality. Generally the two persons are called *kufw* (equal) of each other who are Muslims, have the same lineage, are free and are equal in profession, opulence and character.¹

In *kafā'at* i. e. equality in marriage, age is not the criterion. So the husband being of advanced age is of no consequence^{1a} in the traditional law. According to the present writer there should not, however, be a very marked difference in ages of the spouses as well, so as to nullify the very object of the marriage.

It is stated in al-Hidāyah that the desirable ends of marriage, such as enjoyment of cohabitation, society and friendship, cannot be completely achieved except by persons who are each other's equals, as a woman of high rank and family would abhor the society of and cohabitation with a man who is not her social equal.² It is, therefore, requisite, that the husband should be the equal of his wife.

The law about equality in marriage seems to have been based on some practical difficulties experienced in unequal marriages. It is stated by Al-Kāsānī that many jurists such as Mālik, Karkhī, Ḥasan al-Baṣrī, Sufyān al-Thawrī do not accept this rule as correct.³ They rely on the following precedents in support of their opinion :

- (a) Bilāl, a liberated slave, was married to an 'Arab girl.
- (b) The Prophet (peace be on him) has said that an Arab has no precedence over a non-'Arab.

¹This definition is based on the Hanafi point of view which, for its effects, has a wider scope than any other school of Islamic law.

^{1a}*Shahzada Begum vs. Abdul Hamid*, PLD 1950, Lahore, 504.

²Al-Marghīnānī, 'Ali b. Abi Bakr ; *Al-Hidayah*, Delhi, vol. ii, pp. 299-300

³Al-Kāsānī, 'Alā' al-Dīn Abu Bakr : *Bada'i' al-Ṣanā'i'*, Cairo, 1324 A.H., vol. ii, p. 317.

- (c) The Prophet (peace be on him) and his Companions did not follow this rule.

But it cannot be denied that social equality in marriage in certain respects is essential to the happiness of the spouses.

Indo-Pakistan—Applicability of the rule :

The doctrine of equality in marriage is a part of the substantive Muslim law and, therefore, still applies to Muslims. The Punjab Chief Court, however, held in a case that the inferiority in the social status of the husband does not justify the Court to dissolve a marriage.⁴ To this Writer, this view is in conflict with the accepted rule of the Muslim law. However, truly speaking, it is difficult to follow strictly some of the rules laid down by Muslim jurists on this subject, because some of the grounds on which a marriage was considered unequal in the past have now lost their significance. For example, now, not much importance is attached to lineage and one comes across a case in which a girl belonging to a *Sayyid* family has been married to a man belonging to a non-Sayyid family. Perhaps by evolutionary process of human society, an equality in intellectual level i.e. 'ilm has gained more importance, probably due to advancement in education.

Modern Legislation :

In some Muslim countries equality in marriage in certain respects is still considered of great importance. Thus in Egypt spouses should be equal in lineage, religion, property, piety and profession or social status. The rule has, however, been abrogated in Tunisia. Modern Legislation on the subject in several Muslim countries is given below :—

Jordan :

Disparity in age at the time of Marriage : Under the Jordanian law, two persons cannot become husband and wife if the difference in their age exceeds twenty years, except with the permission of the Court, which can be obtained only if :

- (i) the consent of the party who is younger in age has not been procured by compulsion, and
- (ii) the proposed marriage will not be prejudicial to the interest of the younger party. (Article 21.)

Equality in Marriage : It is essential for the validity of a marriage that the husband should be 'equal' to his wife in financial status and this

⁴*Jamaat Ali Shah vs. Mir Mahmud*, 381C, 10.

means that he should be able to advance her prompt dower (*mahr al-mu'ajjal*) and to provide maintenance. (Art. 22.)

Art. 24. Equality is to be considered at the time of marriage and subsequent imbalance thereof has no effect on marriage.

Art. 27. If the husband is not the 'equal' of his wife, the Qāḍī may dissolve the marriage before the discovery of pregnancy.

Syria :

Equality in Marriage: It is essential for the enforceability of a marriage-contract that the man should be an equal of the woman. (Art. 26.)

Art. 27. Where a major girl contracts herself into marriage without her guardian's consent, the marriage shall be binding if the husband is her equal ; if he is not, the guardian can demand dissolution of the marriage.

Art. 29. Only a woman and her guardian can object to her marriage on the ground of inequality of spouses.

Art. 30. If the wife has become pregnant, the right to annul the marriage on the ground of inequality shall be extinguished.

Art. 31. Equality shall be ascertained at the time of marriage ; its subsequent disappearance shall have no effect.

Morocco :

Equality' in Marriage :

Art. 14. (a) Only the woman herself or her guardian can seek annulment of her marriage on the basis of the 'inequality' of the husband.

(b) 'Equality' is to be assessed at the time of marriage and shall be ascertained in accordance with custom.

Art. 15. It is only the woman herself who can object to any disparity of age beyond the customary limits between her and her husband.

Section 54. In marriage contract it is necessary for the man to be socially equal (*kufw*) of the woman. It is not however necessary for the woman to be socially equal (*kufw*) of the man.

Application of
kafa'at (equality)

COMMENTARY

All the jurists are agreed on the point that in a marriage contract it is preferable for the man to be equal of the woman. It is not necessary for the woman to be equal to the man⁵ because the woman, even if not socially

⁵Qadri Pasha : *Al-Ahkām al-Shar'iyyah fil Ahkām al-Shakhsiyyah*, Cairo, Sec. 62 :

”تعتبر الكفاءة من جانب الزوج لا من جانب المرأة.”

equal to the man, shall be considered to be raised in status because of her becoming the wife of socially superior person. (A husband thus raises the social status of the wife).

Wife's inequality :

If a man marries a woman of unequal status, it is of no consequence, because, firstly, the inequality of the wife is not injurious to the husband as she acquires his status by marrying him, and secondly, he can release her by divorce, if he so desires.

Under Muslim Law, lineage is regarded from the father, for a woman on her marriage acquires the status of her husband and so do the children born of the marriage ; hence, if a man marries or is married to a woman of a status inferior to that of his own family, no one can object to it on the ground of inequality, because the wife acquires the status of her husband and his family. The woman's relations cannot object to such marriage because she is married in a family of a higher status and so they should have no cause for complaint. It is thus apparent that the wife's unequal status does not affect the marriage at all and a man can validly marry a woman of a status inferior to that of his own.⁶ Even if the husband makes equality a condition of the marriage with the woman and she deceives him in this respect, he cannot seek any judicial relief on the basis of inequality.⁷ He may, however, exercise his right of divorcing her on payment of full dower if consummation of marriage has taken place. If the marriage has not been consummated, and the husband wants to divorce her, half of the dower settled shall be incumbent on him. The husband can only take advantage of this rule if his guardian for marriage marries him during his minority for a dower far higher than the dower customary in the girl's family.⁸

Section 55. It is preferable for the man to be equal to the woman in the following elements of *Kafā'at* :

Elements of
kafā'at

1. Islam.
2. Lineage (*Nasab*).
3. Freedom.
4. Calling (or professional class).

Fatawa 'Ālamgiriyyah, Dewband, vol. ii, p. 12 ; *Al-Nasafī* : *Kanz al-Daqā'iq*, Mujtabā'ī Press, Delhi, p. 102 ; *Al-Jazarī*, 'Abdur Rahmān : *Kitāb al-Fiqh 'alal Madhahib al-Arba'ah*, Cairo, 1938 vol. iv, p. 54.

⁶*Fatawa 'Ālamgiriyyah* : op. cit. vol. ii, p. 12.

⁷Ibn al-Ābidīn : *Radd al-Muhtār*, Cairo, 1318 A.H. vol. ii, p. 326.

⁸Ibid, pp. 312-14.

5. Opulence (or financial status).

6. Integrity (or moral standard).

COMMENTARY

There is some difference of opinion among the several schools of Muslim law as to the elements of *kafā'at* (equality) :

1. Hanafi Law :

According to Hanafis, the element of *kafā'at* are : Islam, Lineage, Freedom, Calling Opulence and Character.

2. Maliki Law :

According to Mālikis it is enough for a man to be equal to a woman only in two of the elements : one is religiousness or piety and the other is freedom from those defects on account of which woman gets the right of dissolution of the marriage contract, such as leucocythaemia, insanity, leprosy etc. According to Imam Malik, lineage, freedom, calling and opulence are not so relevant.⁹

Thus, the Mālikis differ from the Hanafis in the conception of inequality. According to them the only conditions to constitute equality are Islam, piety and means to maintain the wife. They do not attach any importance to the question of lineage, and profession. But there is a difference of opinion whether Imam Malik made freedom also a condition of equality in marriage. According to another report, Malik made the following conditions as essential for equality in marriage :

(a) Islam or religion.

(b) The husband being free of the following defects :

(i) Leprosy,

(ii) Leucoderma, and

(iii) Insanity.¹⁰

Under the Maliki law an unequal marriage contracted by the father of a girl shall be binding on her even if it is for an inadequate dower, that is, for dower which is less than the customary dower in the family of the girl. She shall have no right to object to the marriage. But she can get a marriage dissolved when the husband is impotent, eunuch or castrated or suffers from leprosy, leucoderma or insanity or is a slave.¹¹

⁹Al-Jazarī op. cit. vol. iv, pp. 54, 58-59.

¹⁰Al-Ābi, 'Abd al-Samī' : *Jawāhar al-Aklīl*, *Sharḥ Al-Mukhtāsar*, Khalil, Cairo, 1366 A.H. vol. i, p. 277, 298-304

¹¹Ibid.

Shafi'i Law :

According to Imam Shāfi'ī, in *kafā'at* the following four elements are relevant :—

1. Lineage.
2. Religion.
3. Freedom.
4. Calling (Profession).^{11a}

Imam Shafi'ī does not hold integrity or the opulence to be a separate element of *kafā'at*, as they are fluctuating in nature. Imam Shafi'ī agrees to a great extent with Imam Abū Ḥanifah about the essentials of equality, the only difference being that he does not make opulence a condition of equality. He adds, however, that the presence of certain defects in the husband is a ground of inequality.¹²

Under the Shafi'ī law the following conditions are to be taken into consideration for equality in marriage :

- (1) Islam or religion.
- (2) Piety or character.
- (3) *Nasab* or lineage.
- (4) *Hirfah* or profession.
- (5) Hurriyat (freedom from slavery).
- (6) Freedom from certain physical defects.¹³

Hanbali Law :

There are different reports as to the opinion expressed by Aḥmad b. Ḥanbal in respect of an unequal marriage. According to one report he held that an unequal marriage contracted by the father or grandfather of a minor girl shall be preferably valid. But, according to another report, if the guardian of a minor girl gives her in marriage to a man of unequal status or one suffering from a physical defect and he did not know that the husband was unequal to the girl or was suffering from a defect, the marriage shall not be valid, and the girl shall be entitled to exercise her option of puberty. It is stated in the books of Ḥanbali *fiqh* that a guardian, representative or agent of the girl is there for self-guarding her interests, she being unable to conduct her affairs. It is, therefore, not lawful for the guardian to act in a manner which is prejudicial to the interests of the

^{11a}Al-Jazari : op. cit. vol. iv, pp. 64, 58-59.

¹²Ibn Qudamah al-Maqdisi : *Al-Mughnī*, Cairo, 1367 A.H. vol. vi, p. 482.

¹³Ibid.

minor girl. Hence if he contracts an unequal marriage for the girl, she shall be entitled to exercise her option of puberty.¹⁴

Elements of *Kafa'at* :

According to the Hanafi law the elements of *kafā'at*, as indicated above, are more extensive than in any other school of Islamic law. It is, therefore, deemed expedient to discuss them in some detail, alongwith their different aspects as recognized by other schools. They are as under :—

1. Islam :

Sunni Law: Of the elements of *kafa'at*, according to all the jurists a necessary condition is the faith of Islam. Indeed, books of *fiqh* mention a curious argument about the man being a Muslim. It is said that a born Muslim, with respect to Islam, has superiority over a convert Muslim. Thus a husband, who himself is a convert Muslim, marrying into a family of born Muslims is not considered equal (*kufw*) of his wife. Likewise a husband, when only his father is a Muslim and a wife whose father and grandfather both are Muslims, are not regarded as equal (*kufw*). A person who has had only one Muslim ancestor is not the equal of a person who has two or more Muslim ancestors.¹⁵

After the advent of Islam a person was considered, under this rule, to be superior to another whose grandfather had embraced Islam later than the grandfather of the other. This rule must have been based on the fact that people who adopted Islam in the beginning were persecuted and it required great courage and very firm belief to have embraced Islam in its early days. Such people were, therefore, considered superior to those who adopted Islam in later period, when professing of Islam involved no hardships. Besides, the Companions and the people living in the time of the Prophet (peace be on him) were held in great reverence. The descendants of these people also commanded respect and esteem attached to their ancestors. It is stated in *Fatāwa 'Ālamgiriyyah* that this rule did not apply to Arabs, but only to the non-Arabs for they felt proud of themselves in this distinction, (i.e. freedom and Islam).¹⁶

Such distinction, in the present day, is impossible (and improper too) of observance. Every Muslim after accepting the faith of Islam becomes a brother in religion and he is according to Islam a *kufw* of a woman who is

¹⁴Ibid, pp. 488-89 ; Sharf al-Dīn Mūsā : *Al-'Iqnā'*, Cairo, n.d. vol. iii, p. 202.

¹⁵Al-Marghīnānī : op. cit. vol. ii, p. 300 ; *Fatāwā 'Ālamgīriyyah*, op. cit. vol. ii, p. 13 ; Ibn Ābidīn : op. cit. vol. ii, pp. 327-28.

¹⁶*Fatāwā 'Ālamgīriyyah*, op. cit. vol. ii, p. 13 ; Ibn Abidīn : op. cit. vol. ii, pp. 327-28.

even a born Muslim. Thus in Islam, as regards *kafa'at*, it is just sufficient that the husband and wife are Muslims, though their forefathers may or may not be Muslims.

Equality in Islam does not mean that the spouses should belong to the same sect. Hence, a marriage between persons belonging to different sects of the Sunnis shall be considered to be equal. Similar, in the case of the marriage of a Shi'ah to a Sunni. It is, however, desirable if the spouses belong to one and the same sect, i.e. Sunnīs or Shi'ahs.

Shi'i Law : The Shi'i law also insists on equality in marriage but the only conditions for equality are Islam and the ability to maintain the wife. Under the Shi'i law, the condition regarding Islam has different connotation than what it means under the Sunni law. As discussed above, the condition of Islam under the Sunni law attaches superiority to a person who, or whose ancestor, embraced Islam earlier to one who, or whose ancestor, adopted Islam later. Under the Shi'i law the condition only means that both the spouses should be Muslims.¹⁷ It has no reference to priority in adoption of the faith. It is not, however, an essential condition that they both should be Shi'ahs, but it has been considered desirable to marry a Shi'ah girl to a Shi'ah male. Such a marriage, however, is not invalid in any way ; it is only disapproved of.

According to some Shi'i jurists, however, equality in Islam (that is, being Muslims) is not sufficient, but there must also be equality in *Imān* (faith) also. *Imān*, in the Shi'i textbooks, is used in a special sense so as to distinguish the Shi'ahs from the Sunnīs and other sects of Islam. But it is stated in *Sharā'i al-Islam* that, according to the generally accepted view, equality in respect of Islam is all that is required. Such a marriage, that is, a marriage between a Sunni and a Shi'ah girl has been considered merely "makruh" (undesirable).¹⁸

Indo-Pakistan Law :

It was held by a Bench of the Calcutta High Court in the case of *Syed Ghulam Hossain Chowdhry Vs. Mst. Setabah Begum*¹⁹ that they could nowhere find that a Sunni was incapacitated from marrying a Shi'ah girl and held that such a marriage was good. A case of similar nature also came up for decision before a Division Bench of the Allahabad High Court in the case of *Aziz Bano Vs. Ibrahim Husain*.²⁰ Both Sulaiman and Mukerji JJ., held that the marriage of a Shi'ah girl with a Sunni was valid and legal. The learned judges, however, stated that where a Shi'ah girl was given in

¹⁷Al-Hilli, Ja'far b. al-Hasan : *Sharā'i al-Islām*, op. cit. p. 183.

¹⁸Ibid.

¹⁹6-Weekly Reporter, 88.

²⁰A.I.R., 1925, All. 823.

marriage by her father during her minority then she has a right to repudiate it on attaining puberty, because the marriage may affect her religious sentiments and so is to her manifest disadvantage. There is a difference of opinion in the matter whether a Shi'ah can marry a Kitābiyah i.e. a woman belonging to a revealed religion. According to *Shara'i' al-Islam*, there are two version : According to one it is forbidden and according to the other it is valid only in the case of mut'ah marriage, but the latter authorities validate it. It is, however, highly disapproved, nevertheless not forbidden. This view has also been accepted by the Supreme Court of Pakistan.²¹

II. Lineage or Nasab :

Equality in lineage is also an essential condition for equality in marriage according to some jurists. This concept, however, according to the present writer, is alien to Islam which stands itself for removal of all distinctions of caste, creed and colour. The Muslims believe in equality of mankind and there can be no claim of superiority in Islam on the basis of tribe, nation or country.

In the holy Qur'ān it is stated that the Belivers are brother.²² It is further laid down in the same Surah of the holy Qur'ān, "Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you." Here, precedence is given to a human being solely on account of piety, (*taqwā*), so that there should be no discrimination between an Arab and a non-Arab. The Prophet (peace be on him) has also stressed on it in his sermon on the occasion of his last Hajj that no one has superiority over others by reason of his nationality or country. Thus he stated, "the Arabs have no precedence over the non-Arabs, nor the non-Arabs over the Arabs, nor the white one over a black except by excelling in righteousness."²⁴ He has thus declared in unequivocal terms that all human beings are equal, regardless of their individual or racial status, and that no one can claim any preference or superiority over others, except by reason of his piety. Moreover, equality in lineage was not a condition of equality in marriage in the early period of Islam. 'Abdur Ramān b. 'Awf, a prominent Companion, gave his sister in marriage to Billāl who was a negro emancipated

²¹Syed Ali Nawaz Gardezi vs. Lt. Col. Muhammad Yusuf, P.L.D, 1963, S.C. 51.

²²*Al-Qur'ān*, Surah *Al-Hujrat*, (The Inner Apartments), xLIV : 10,

” انما المؤمنون اخوة ”

²³Ibid, xLIV : 13,

” ان اكرمكم عند الله اتقاكم ”

²⁴Ahmad b. Hanbal : *al-Musnad*, Cairo, 1313 A.H. vol. v, p. 411.

slave. Zayn al-ʿĀbidīn, maternal great grandson of the Prophet (peace be on him) and a very learned Imam gave his daughter in marriage to a liberated non-Arab slave and had himself taken in marriage an emancipated non-Arab slave girl. The Ruler wrote to him that he had brought disgrace on all the Arabs. In reply the Imam referred to the Ruler the precedents set up by the Prophet (peace be on him), who had married a liberated Jewess slave girl and had given his own cousin in marriage to Zayd, a liberated non-Arab slave.²⁵

It appears from a historical analysis that the concept of the superiority of the Arabs over non-Arabs developed later ; and it may be the result of their victories over the Persian and Byzantine empires. Besides, the Arabs were very particular about maintaining racial purity and considered themselves superior to the non-Arabs on this account. Thus, it is stated in *Sharh al-Wiqayah* that superiority of the Arabs in respect of marriage is due to the fact that the non-Arabs have lost their pedigree (racial purity) by inter-tribal marriages. It also seems likely that non-Arab jurists of later period adopted this view on account of their great reverence for the Prophet (peace be on him) and attached great importance to everything connected with him. Hence they considered the Arabs to be superior to the non-Arabs, and amongst Arabs they considered the Quraysh tribe, to which the Prophet (peace be on him) belonged, to be superior to other Arabs.²⁶ Hafiz Ibn Hajar has, however, stated that there is no basis or Tradition for making equality in lineage a condition of marriage.²⁷ This view seems to be correct.

Reasoning :

The law about equality in lineage seems to have been based on practical difficulties experienced in case of mixed marriages. There may be another ground for the adoption of this view that Muslim jurists found that the marriage in which husbands and the wives belonged to different races did not prove happy, and so they introduced this rule of equality in lineage as a safeguard.

Hanafi Law :

The Hanafi jurists lay great stress that there should be equality in lineage in marriage.²⁸ For this purpose they hold that people belonging to

²⁵Manāzir Ahsan Gīlānī : *Haḍrat Imām Abū Ḥanīfah kī siyāsi Zindagī*, Karachi, 1966, p. 177.

²⁶Ubaydullah b. Masʿūd ; *Sharh al-Wiqāyah*, Delhi, 1345 A.H., vol. i, p.

²⁷Ibn Hajar al-ʿAsqalānī : *Fath al-Bārī*, Cairo, 1325 A.H., vol. ix, p. 104.

²⁸Al-Marghīnānī : op. cit. vol. ii, p. 300 ; Ibn ʿĀbidīn : op. cit. vol. ii, p. 327.

the Quraysh tribe are superior to the other Arabs while all the other Arabs are superior to the non-Arabs.²⁹ Arabs excepting the Quraysh are considered to be equal to each other, but the Banī Bāhilah tribe (Arabs themselves) are not the equals of the Arabs of other tribes, they being notorious throughout Arabia for every kind of vice.³⁰ This shows that character not only of an individual, but even of a group to which he belonged was taken into consideration in the matter of equality in *nasab*. The Arabs were supposed to be superior to the non-Arabs to such an extent that the marriage of an Arab girl to a non-Arab was considered to be derogatory to the girl's family, however high the wordly position of the husband might be. Thus, even a non-Arab Ruler is not deemed to be the equal in marriage with an Arab woman.³¹ But great importance is attached to learning.³²

Maliki, Hanbali and Shafi'i Laws :

Maliki, Shafi'i and Hanbali Laws do not make equality in lineage a condition of equality in marriage.

Conclusion :

According to Hanafi and Shafi'i jurists, lineage is an important part of *kafa'at*. In the opinion of the present writer, it seems to be based on class distinction which is not permissible in Islam. The conception arose due to prevalent social conditions of the Arabs. Besides Arabia and Indo-Pakistan sub-continent where it is due to the influence of Hindu culture and civilization on Muslims, in no other Muslim country any importance is attached to the equality in lineage relating to the doctrine of *kafa'at*. Indeed, the only differentiation observable is that between "obscure parentage" and "known parentage" which is duly maintained. Ibn Humām, Dāmād Āfandī, the authors of *Fath al-Qadir* and *Majma' al-Anhur* respectively, have written that learning has precedence over lineage.³³

III. Freedom (from slavery) :

Another aspect relating to equality is to be free. A slave cannot be the equal of a free woman.³⁴ Now that the slavery does not exist as an institution, discussion on the same is superfluous.

²⁹*Fatawa 'Ālamgīriyyah*, op. cit. vol. ii, p. 12 ; Ibn 'Ābidīn, op. cit. vol. ii, p. 327.

³⁰*Al-Marghīnānī* : op. cit. vol. ii, 300.

³¹Ibn 'Ābidīn : op. cit. vol. ii, p. 327.

³²Ubaydullah b. Mas'ūd : *Sharh al-Wiqayah*, Delhi, 1345 A.H. vol. ii, p. 28.

³³*Al-Jazarī* : op. cit. vol. iv, p. 55.

³⁴*Fatāwā Ālamgīriyyah* : op. cit. vol. ii, p. 13 ; Ibn 'Ābidīn : op. cit. vol. ii, p. 327.

IV. Profession (Hirfah) :

Another essential condition of equality in marriage, according to the Hanafīs, is that the husband should not be carrying on a profession which is inferior to the profession carried on by the members of the wife's family.³⁵ Abū Yūsuf and Muḥammad hold equality in profession to be a necessary condition of marriage.³⁶ Qāḍī Khan too has held the principle of these two Companions (Ṣāḥibayn) to be correct. A number of reports are attributed to Abū Ḥanīfah. According to *Zahīr al-riwāyat*, (kitāb al-Aṣl) he does not make equality in profession an essential condition of equality for marriage, while, according to the other report, he considers it to be an essential condition. According to another report both Abū Yūsuf and Muḥammad hold that profession is not to be taken into consideration, unless it is so contemptuous, mean and degrading as to bring disgrace to the woman's family in which case the marriage can be dissolved on this ground as it would be unequal.³⁷ Some jurists hold that there can be no condition of equality in profession as a man can change it at any time.³⁸ The material time when a man's profession is to be seen is the time of marriage and a subsequent change in his position is of no consequence.³⁹ The condition of equality in profession according to Abū Ḥanīfah, did not and does not apply to the Arabs, as reported by al-Karkhī, who were and are considered equals irrespective of their professions.⁴⁰ But in countries other than Arabia there was a marked difference in social status and standard of living among various classes of society, and they did not encourage inter-marriages between them. Profession, social status and respectability were considered to be so closely associated as to be one and the same thing. This condition was justifiable on the ground that some prestige and respectability was generally attached to certain professions while a degree of inferiority was annexed to certain other professions on account of their being considered low, so that respectability or importance differed with different professions.⁴¹ The marriage of a girl whose family

³⁵Ibn 'Ābidīn : op. cit. vol. ii, p. 330.

³⁶Al-Marghīnānī : op. cit. vol. ii, p. 301 ; *Fatawa 'Alamgiriyyah* : op. cit. vol. ii, p. 13.

³⁷Al-Marghīnānī : op. cit. vol. ii, p. 301 ; Ibn 'Ābidīn : op. cit. vol. ii, p. 330.

³⁸Al-Marghīnānī : op. cit. vol. ii, p. 301.

³⁹Ibn 'Ābidīn : op. cit. vol. ii, p. 331.

⁴⁰Ibid, p. 330.

⁴¹Al-Marghīnānī op. cit. vol. ii, p. 301.

carried on a more respectable profession to a person whose family carried on a low profession was considered to bring discredit to the girl's family and thus lowered its prestige.⁴² There was also a risk that the girl being used to a certain way of living might find it hard to live with people whose standard of living was comparatively very low. Thus, the marriage of the daughter of a merchant to a barber or washerman was looked down upon and was considered to be a disgrace to the girl's family. The distinction of profession was more relevant in old times when families carried on and confined themselves to the same business or profession from generation to generation. They came to possess certain particular traits of character. The importance or unimportance attached to a particular profession rested on the general opinion of the public, and sometimes differed in different countries. The profession of a sweeper, shoe-maker, barber or washerman was considered low while that of a teacher, doctor, government servant considered respectable.⁴³ A sweeper, cobbler, washerman, or barber was considered lower in respectability than a tailor or a draper. It is stated in *al-Durr al-Mukhtar* that unscrupulous officials are lower to the lowest professionals even if they are wealthy because their wealth has been earned by corruption and unlawful means.⁴⁴

Conclusion :

But this adherence to one profession by a particular family is no longer a good rule. The result is that persons carrying on a certain profession can no longer be deemed to possess certain traits of character. Hence, the status attached to various professions has undergone a radical change during recent times and the nature of profession cannot be a safe guide to determine the equality of a marriage unless the difference is so glaring as to leave no doubt in the matter. But there can be no doubt that a marriage may be dissolved when the difference in respect of the professions carried on by the husband and the wife's family members generally is very marked and the wife's family is looked with disgrace on account of the husband's low profession. Thus a runaway marriage between the daughter of a person and his servant, engaged for menial work, can be considered unequal. Such a marriage will obviously be ill-assorted and is probable to lead to misery and unhappiness for the girl and so may be annulled for that reason on the ground of inequality. It is stated in *Radd al-Muhtar* that the status of professions changes from time to time and so must be decided according to the special conditions of the times.⁴⁵

⁴²Ibn 'Ābidīn : op. cit. vol. ii, p. 331.

⁴³Ibid, p. 330-31.

⁴⁴Ibid, p. 330.

⁴⁵Ibid, p. 331.

V. Property or Wealth—Opulence (Mal) :

Another condition of equality in marriage, according to the Ḥanafis, relates to fortune or the financial condition of the husband. According to Hanafi jurists, equality must exist in respect of financial position and property also. It is considered that an ill-assorted marriage with respect to the financial conditions of the spouses, is apt to result in unhappiness. A girl brought up in comfort or luxury may find it hard to live with a husband whose means are very limited so that she shall have to live in a way which she is not accustomed to, and may have to experience great hardships on that account. Such a marriage may end in misery and unhappiness. The Hanafi jurists, therefore, explain that wealth contributes to the prestige of a family while poverty lowers its esteem.

According to a report, both Abu Ḥanīfah and Muḥammad hold that the fortune of a man is to be considered in general because a man may be capable of paying both the dower and the maintenance of the wife and yet may not be the equal to a wife possessed of large property. They explain that men considered wealth as conferring superiority and poverty as causing loss of prestige. Abū Yūsuf, on the other hand, says that wealth is not to be taken into consideration as it is an unstable thing that may be acquired in the morning and lost before night.

There is a difference of opinion as to whether a husband will be considered to be wife's equal if he is able either to pay the wife's dower or to maintain her, or that he should be able to meet both the liabilities. Abū Yūsuf holds that the ability to pay the wife's dower is not a necessary condition of equality. He will, therefore, be considered wife's equal, if he is able to maintain her. His reasoning is that payment of dower can admit of delay, but the payment of maintenance cannot be delayed. Abū Hanīfah and Muḥammad do not agree with the view expressed by Abū Yūsuf. They contend that the husband should be able to meet both the liabilities so as to be the wife's equal in opulence.⁴⁶

Conclusion :

The jurists agree on the point that man's financial equality with the woman is established if he is capable of paying the prompt dower at the time of contracting marriage with her and is able to bear her maintenance expenses. Some of the jurists are of the view that a man who is only capable of defraying maintenance expenses and paying the prompt dower cannot be the equal of a well to do and wealthy woman. Accordingly, Allama Abdul Raḥmān Al-jazārī, the author of the book, "*Kitāb al-fiqh 'alal Madhahib al-Arba'ah*" states that these days great attention is paid to financial position. If a wealthy woman is contracted into marriage with

⁴⁶Al-Marghīnānī: *Al-Hidayah*, Qur'ān Mahal, Karachi, vol. ii, p. 320-21.

a man who is only capable of paying the prompt dower and defraying her maintenance expenses, then this capability of the man is of little importance to the woman ; in such circumstances the level of social status is a question to be decided by a court. The Court, while considering the matter for obviating quarrels and disputes, may see how far the man can protect the woman's honour and to what extent he is capable of preventing the woman from going disgruntled in marriage.⁴⁷

VI. Character :

Character i.e. piety is also a condition of equality in marriage. Allāh in the Holy Qur'an says,⁴⁸ “ان اکرمکم عندالله اتقاکم” “Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you.” Creditable is really the piety and abstinence from sins. A debauched and a profligate man cannot, therefore, be the equal (*kufw*) of a virtuous woman.

The Prophet (peace be on him) is reported to have said, “A woman is contracted into marriage for four considerations, namely, (i) wealth, (ii) position of her family, (iii) beauty and (iv) virtue, but you must give preference to virtue.”⁴⁹

It is stated in *al-Durr al-Mukhtār* that marriage shall be contracted with the intention to remain chaste and a man should marry a woman who is chaste and bears good moral and religious character, and should not marry a woman who belongs to a disreputable family.⁵⁰ This rule gets high lighted in the context of the recent upheaval of Muslim Society in Pakistan, on the partition of India, where piety in giving way to wealth.

Analysis :

From the above discussion the fact becomes clear that the Hanafis have enhanced greatly the elements of *kafā'at* whereas the Mālikis look at it with less strictness. The latter hold only being non-Muslim and suffering from particular physical defects to be the causes of non-equality. The first element necessary, that is, Islam is common among all the jurists (including the Shi'ah) and the second, in fact, has no direct concern with the question of *kafā'at* ; rather it is connected with the woman's right of separation, on the ground of husband's suffering from such disease. Imam Shafi'i does not hold integrity and opulence to be the factors of *kafā'at*. It

⁴⁷Al-Jazarī : op. cit. vol. iv, p. 55.

⁴⁸Al-Qur'ān : surah Al-Hujrat (Inner Apartments) XLIX : 13,

“ان اکرمکم عندالله اتقاکم -”

⁴⁹Wali al-Dīn al-Khatīb : Mishkāṭ al-Maṣābīh, Delhi, 1350 A.H., vol. ii, p. 267.

⁵⁰Al-Haskafī : *Al-Durr al-Mukhtār*, Cairo, vol. ii, p. 360.

so appears that he prefers Islam with its total religious demands as essential and rejects mere opulence from being included in *kafa'at* because of its constant fluctuating nature.

The *kafā'at*, in fact, aims at creating love and harmony in the lives of the spouses. This harmony cannot be achieved unless the husband is equal to the wife in most of the things. Hence, limiting the elements of social equality (*kafa'at*) shall be inexpedient. The Hanafis point of view, in principle, appears to be more appropriate, but its practical application in modern time is proving somewhat difficult.

Here it is, however, necessary to mention that social equality is not a legal condition for the lawfulness or validity of marriage contract. Consequently the Caliph 'Umar, Abdullah b. Mas'ud, 'Umar b. Abdul Aziz, 'Ubayd Ibn Umayr, Hammad Ibn Abi Sulayman, Ibn 'Awn, Imam Malik, Imam Shafi'i and others are not convinced that social equality is an absolute condition in a marriage contract. Abul Hasan Karkhi and Abu Bakr Jaṣṣās of the Hanafis too do not give importance to *kafa'at* in the matter of marriage contract.⁵¹

The traditions in respect of *kafa'at* that have been quoted by Bayhaqi in his Book, "*Al-Sunan al-Kubra*" excepting one narrated from 'Ali, have been held by Bayhaqi himself to be weak and not worth citing in proof.

Conclusion :

Hence, after examining the Qur'ānic verses and the words and acts of the Prophet one may come to the conclusion that *kafa'at* in marriage contract is in itself no condition for the lawfulness or validity of the marriage contract, though it is desirable and advantageous. Its application in the present times is very rare. Distinction shall, however, be made in case of such families wherein the principle of *kafā'at* is being constantly maintained and adhered to from generation to generation for centuries together. If a girl of such a family contracts her marriage with a socially undesirable or unequal person, without the permission of her guardian, and this is a cause of disgrace and scorn for her family, the guardian of the girl has the right of instituting a suit in a court of law for the cancellation of the marriage contract. It would be equally open to a girl to challenge a marriage contracted for her by her guardian if the husband is of an unequal status and the marriage is injurious or disadvantageous to her, besides exercising her option of puberty (*Khayār al-Bulūgh*).

⁵¹Abn Qudamah Al-Maqdisi : *Al-Mghnī*, Cairo, 1367 A.H. vol. vi, p. 780 ; Ibn 'Ābidīn : *Radd al-Muḥtār*, vol. ii, chap. on Kafā'at, p. 136 ; Bayhaqī : *Al-Sunan al-Kubrā*, Hyderabad Deccan, 1353 A.H., vol. vi, p. 136 ; Ibn Nujaym : op. cit. vol. iii, p. 139.

Section 56. Regard shall be had of *Kafa'at* (Equality) only
 Regard of *kafa'at* (social equality) at the time of contracting marriage.

COMMENTARY

All the jurists agree on the point that consideration of *Kafa'at* shall be had only at the time of contracting a marriage.⁵² After the marriage its continuity is not regarded as essential. The question whether the husband is of the kin or an alien shall be decided by the conditions and testimonies existing at the time of contracting marriage. If the cause of inequality arises afterwards, the marriage contract shall not be cancelled. For instance, at the time of marriage contract the man is of good disposition and pious but he afterwards turns immoral and unchaste. Because of such incompatibility, then, the marriage contract cannot be cancelled on the basis of *kafā'at*.

Section 57. If an adult woman gets herself contracted into marriage with an unequal, the marriage contract shall be valid. The guardian, indeed, shall have the right of objecting to it and of getting the marriage contract annulled through court on account of patent social inequality, which may occasion loss of prestige or bring disgrace to the family.

COMMENTARY

Imam Abu Hanīfah holds that a marriage got contracted by a mature woman with an unequal person is perfectly valid. Imams Abu Yusuf and Imam Muhammad are also of the same opinion. It is true that the guardian of the woman shall have the right of objecting to it and getting the marriage contract annulled through court. As long as separation, because of her guardian's objection, is not effected by court the rules of divorce, *Zihar*, *Ila* and mutual inheritance shall remain applicable.⁵³

Here a doubt may arise that if *Kafā'at* is not a condition for the validity of marriage contract, how then the right of getting the marriage contract cancelled through court shall accrue to the guardian? The fact is that *Kafa'at* is established on the status of the woman and the guardian,

⁵²*Fatawā Qadi Khan*, vol. i, Chapter on *Kafa'at*; Ibn Nujaym: op. cit. p. 139. Al-Haskafi, 'Alā' al-Din: *Durr al-Mukhtar* on margin of *Radd al-Muhtar*, vol. ii, p. 331.

⁵³*Fatawa 'Ālamgiriyyah*, Dewband, vol. ii, p. 13; *Fatawa Qāḍī Khan*, vol. i, p. 164; Ibn Nujaym: Egypt, vol. iii, p. 139; Al-Haskafi: op. cit. vol. ii, p. 231; Qadri Pasha: op. cit. sec. 62.

not on the right of the individual. That is why, the guardian has been given the right of raising objections on reasonable grounds.

It is, however, necessary here to make it clear that the right of raising objection by the guardian in marriage contract on the ground of inequality belongs only to *Wali al-Asbah* (residuary). Distant kindered or the officer of the court has no right to raise objections on the ground of inequality.⁵⁴ The reason for this is that a woman's marriage with an unequal directly affects her family members. Because of a disgrace that her family members feel only her *Wali al-Asbah*, on the ground of inequality, has the right of getting her marriage contract annulled through court.⁵⁵

Section 58. The guardian's right of raising objection (to marriage contract) lapses after a child is born to the woman or pregnancy becomes known.

Lapsing of
guardian's right

COMMENTARY

There is no period fixed for the guardian to apply to court for the annulment of the marriage contract on the ground of inequality. If the guardian after information and knowledge of the inequality maintains silence, his right of raising objection because of his silence shall not lapse except when his silence amounts to his consent. All the jurists, however, are agreed on the point that after a child is born to the woman, the guardian's right of raising objection to her marriage contract lapses. The reason for this is that the birth of a child to a woman makes her relationship with her husband closer. Besides, an established status is also the right of the child. Which child would like that it be burdened with questionable relationship of the parents.⁵⁶

Section 59. On the ground of inequality separation shall be effected by the order of the court.

Separation by
Court

COMMENTARY

Under the Hanafi law, an adult Muslim girl can marry any one she likes even against the wishes of her parents or other relations and guardians. But it is a well recognised rule of Hanafi law that a marriage otherwise lawfully contracted by an adult girl may be annulled by a *Qāḍī* at the instance of one of her near relations if it is proved that the inequality of the

⁵⁴Al-Jazari : op. cit. p. 56 :

” ان الكفاة في الامور المذكورة من حق الولي بشرط ان يكون عصبية ولو كان غير محرم . اما ذوى الارحام ، و الام ، والقاضى فليس لهم حق في الكفائات “

⁵⁵Al-Nasafi : op. cit. p. 102.

⁵⁶Al-Jazari : op. cit. p. 56 :

ثم اذا سكنت الولي عن الاعتراض حتى ولدت المرأة فان حقه يسقط في الكفاة

husband injuriously affects the family's prestige. What is to be seen in such a case is not the indiscreet exercise of her right by the girl but the discredit or disrepute caused or likely to be caused to the family.

Object of the Rule :

The rule regarding equality is not merely restricted as a safeguard for the family but advantage can be taken of it to save a girl from the consequences of a reckless marriage and to get her released in certain cases from an unhappy marital alliance when she herself finds it difficult to get it dissolved. Thus, it happens sometimes that an unsophisticated girl is influenced by an unscrupulous and undesirable person to enter into a runaway marriage with him ; such a marriage brings untold misery and unhappiness to the girl who repents of her blunder afterwards, but finds no way out of it. This rule of law can be applied with advantage in the case of such a marriage and it may be dissolved at the instance of her guardian who is an agnate (wali al-'asbah)

If a woman gets herself contracted into marriage with an unequal the guardian has the right of getting the marriage contract dissolved. But separation cannot be effected without the decree of a court.⁵⁷ Hence the marriage contract shall stand till the court passes a decree dissolving the same. During the proceeding in court if one of the couple dies the survivor shall be the heir of the deceased.⁵⁸

Section 60. Separation on the ground of inequality shall be equivalent to the dissolution of marriage contract.

Effect of
separation

COMMENTARY

In the event of the court getting a separation effected between the couple on the ground of inequality, if consummation has not taken place no dower or the observance of the term of probation shall become due and incumbent. If however, consummation has taken place, the wife shall be entitled to her dower and the observance of the term of probation shall be incumbent upon her. During the observance of her term of probation her maintenance too shall be due from the man.⁵⁹

⁵⁷Fatawa Alamgiriyyah, op. cit. p. 13.

⁵⁸Ibn al-Nujaym : op. cit. p. 137.

⁵⁹Fatawa Alamgiriyyah : op. cit. p. 13-14 ; Al-Haskafi : op. cit. p. 306.

CHAPTER—VII

Dower

Section 61. Dower (*Mahr*) is that financial gain which the wife is entitled to receive from her husband by virtue of the marriage contract itself whether named or not in the contract of marriage.

COMMENTARY

The conception of proprietary financial interest is the basic characteristic of dower, because the real object of dower is financial gain. Allah has said,¹ “Except for these all others are lawful, provided ye seek (them in marriage) with gifts from your property—desiring chastity, not lust.”

Dower, in fact, is the name of that financial gain that accrues in marriage to woman in lieu of the pleasure to be enjoyed of her, though the marriage be either valid or irregular, or even cohabitation be in doubt.² Qāḍī *Khān* calls dower a consideration for the proprietorship of the uterus.³ Dower, in its true character, is not the exchange or consideration given or agreed to be given by the man to the woman for entering into the contract; but it automatically ensues from the marriage contract, as its effect, imposed by the law on the husband as a mark of respect and honour to the woman. Hence, “the marriage is valid though no dower were mentioned, and even though it were expressly stipulated that there would be no dower.”^{3a}

Every lawful object that is of value may be fixed as dower. Accordingly cash, merchandise, goods, immovable property, company shares or dividends, etc. may be settled as dower, provided the property be such that it is certain, lawful and is capable of being taken into possession.

¹Al-Qur’ān, surah *Al-Nisā’* (The Women), iv : 24,

”واحل ماوراء ذلكم ان تبتغوا بماوالمكم محصنين غير مسافحين“

²Al-Jazari, Abdul Rahmān : *kitāb al-Fiqh ‘alāl Madh̄hib al-Arba‘āh*, Cairo, vol. iv, p. 94 :

”فهو (الصداق) اسم للمال الذى يجب للمرأة فى عقد النكاح فى مقابلة الاستمتاع بها وفى الوط بالشبهة او نكاح فاسد او نكاح ذلك“.

³*Fatawa Qāḍī Khan*, Delhi, vol. i, p. 173 :

”اما المهر بدل البضع وقد ملك بضعها فيطالب به“

^{3a}Al-Marghīnānī : *Al-Hidayah*, Qur’an Mahal, vol. ii, p. 323-24

Pakistan Law :

It was held by the Peshawar High Court in the case of *Zarin Qaisha Vs. Arbab Wali Muhammad* that “*Mahr* or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage. Under Mohammadan law dower is a mark of respect to the wife.^{3b}

Section 62. The amount of dower, at the lowest, is ten *dirhams* or its equivalent in the country's currency or any object of equal value, and at the highest there is no limit.

The amount of
dower

COMMENTARY

According to *zāhir al-riwāyat*, the Ḥanafī and Shafī'ī jurists hold that the lowest amount for dower is ten *dirhams*⁴ or any object of equal value.

According to Imām Mālik, the lowest amount for dower is three *dirham* and according to some others it is five *dirham*.⁵ If some one settles the dower at less than ten *dirhams* and the woman be agreeable to that, even then ten *dirhams* shall have to be paid as dower, as the religious mandate is for ten *dirhams*. Imām Muḥammad has, therefore, held in his book *Muwaṭṭā'* that the lowest amount of dower is ten *dirhams*.⁶

In Ḥanafī law the lowest amount of dower has been fixed but its highest limit has not been prescribed. In Shi'ah law even the lowest amount of dower has not been fixed.

It is essential for the dower to be such an object or financial gain that its use be religiously permissible. Thus, wine or hog's meat cannot be fixed as woman's dower. If such objects be fixed as dower, it would be invalid ; the marriage contract, however, shall be valid and the proper dower shall be due on the husband.⁷ According to Imām Mālik such a marriage contract shall be irregular and can be rescinded before consummation takes place. If cohabitation does take place, the marriage contract shall become valid and the woman shall become entitled to proper dower.

^{3b}P.L.D. 1976 Peshawar, p. 128.

⁴*Ḥadīth* reported by Ibn 'Abī Ḥātām :

” لا مهر اقل من عشرة دراهم “-

⁵Ubaydullah b. Mas'ūd : *Sharh Wiqāyah*, Muḥtabai Press, Delhi, Chapter on “Dower,” vol. ii, p. 32.

⁶Imām Muḥammad Al-Shaybānī : *Muwaṭṭā'*, Karkhana Tijarat Kutub, Karachi, p. 237.

⁷Al-Tazarī : *op. cit.* vol. iv, p. 97.

Indo-Pakistan Law :

Minimum and maximum : In the case of Sunnīs the minimum amount of dower is 10 *dirhams* (which is something between Rs. 3 and 4) ; and in the case of Shi'ahs, there is no fixed legal minimum. (1912) 14 OC 356 : 13 Ind. Cas. 882 (DB).

Amount of dirham, meaning of : The money value of a decree of 10 *Dirhams* is something between Rs. 3 and 4. (1909) 32 All 167 : 7 ALJ 116 : 5 Ind. Cas. 411 (DB).

Modern Legislation :*Egypt :*

Dower: Art. 18. If there is a dispute between the spouses as to the amount of dower, the wife shall be asked to prove her claim. If she fails to do so, the statement on oath made by her husband shall be accepted, except when he states an amount which cannot be normally supposed to be the dower of a woman of her status. In such a case, the proper dower (*mahr al-mithl*) of the wife shall be binding on him.

Art. 19. Where the parties to such a dispute are one of the spouses and the heirs of the other spouse, or the heirs of both the spouses, the provision of Article 18 shall apply. (Law No. 25 of 1929).

Sudan :

Disputes relating to dower : Art. 10. Where there is a dispute regarding the amount of dower, unless the wife can prove otherwise the husband's statement on oath shall be accepted ; but if he states an amount which cannot normally form the dower of a woman of the wife's status, the proper dower shall be binding on him.

Jordan :

Dower : Art. 43. Where the wife has received her dower, or where the parties have agreed to defer the payment of dower for a stipulated period, the wife cannot refuse consummation of marriage.

Art. 51. A dispute concerning dower shall not be entertained if the claim made in this respect is different from the entry in the certificate of marriage or is not proved by documentary evidence.

Art. 55. Where a marriage has not yet been consummated and the husband is unable to pay the prompt dower, the wife can bring a suit for the dissolution of her marriage. The Qāqī shall thereupon give one month's time to the husband and if he fails to pay it within that period the marriage may be dissolved. If, in such a case, the husband is absent, or if his whereabouts are not known, or if he has no property in the place, the marriage may be dissolved forthwith.

Tunisia :

Dower: Art. 12. Anything which is lawful and has a monetary value may form the dower, it cannot be a valueless thing, nor there is any maximum limit to it. The Dower is wife's property which she may dispose of as she likes.

Morocco :

Dower. Art. 16. Dower means any property given by the husband representing his intention to have a family life based on mutual affection and company.

Art. 17. Anything that may be the subject of a legal obligation may form the dower ; there is no maximum or minimum thereof.

Art. 18. Dower is the property of wife which she can dispose of as she wants. The husband cannot set off any part thereof against any household goods given by him to the wife.

Art. 19. The father or other guardian cannot demand from the husband any money for handing her over to him or for acting as her guardian.

Art. 23. Where a legally major girl agrees to a dower which is less than her proper dower (*mahr al-mithl*), her guardian cannot object to it.

Art. 24. Where there is a dispute between the spouses as to the payment of dower, the wife's claim shall be accepted if the dispute arises before consummation of marriage. But if it arises after that, the husband's statement shall be accepted.

Section 63. The Kinds of dower are :

Kinds of dower 1. Specified dower.

2. Proper dower or Customary dower (*Mahr al-Mithl*).

Specified dower is that which is specified at the time of marriage contract between the parties. It is of two kinds :—

(a) Prompt dower.

(b) Deferred dower.

(a) Prompt dower is that which is promptly paid at the time of marriage contract or is payable promptly on demand.

(b) Deferred dower is that which is payable on dissolution of marriage by death or divorce.

COMMENTARY

Specified Dower :

Specified dower is an incident of a valid marriage only but not in an irregular marriage. In the event of irregular marriage contract, when penetration has taken place, specified dower or the proper dower, whichever is less, shall become due on the man. In an irregular marriage proper and not specified dower becomes due because of the cohabitation, not on account of marriage contract itself. No proprietary right in the uterus, in irregular marriage contract, is created in favour in the man. The dower, because of cohabitation in irregular marriage contract, has therefore been interpreted by the jurists as compensation for cohabitation.

Indo-Pakistan Law :

Wife is entitled to recover dower however large: However large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death. [AIR (Vol. 26) 1939 Rang 28 : 1939 Rang LR 383 : 179 Ind. Cas. 477 (DB).]

Dower fixed privately and inflated amount announced for glorification of husband—real dower is one fixed in private : The principle of As-Sum'at recognizes two agreements with respect to the dower. One agreement is in private for a real amount and the other agreement for an inflated amount is in public for the glorification of the bridegroom and his family, and if this is proved, then the real dower, which has been fixed in private should be allowed. The private settlement, according to the principle of As-Sum'at precedes the marriage and the proclamation of enhanced dower for glorification takes place at the time of marriage. [PLD 1967 Pesh. 328 (DB). PLD 1969 S. C. 194-21 DLR S. C. 145.]

Dower stated in registered deed, no other dower fixed privately, earlier plea of private agreement of less than stated dower cannot be entertained : Where there is no allegation that any dower which could be said to be the real dower, was fixed in private between the parties prior to the agreement of dower incorporated in a registered dower deed, the principle of As-Sum'at is not attracted and even reference to this principle is not very much pertinent. [PLD 1967 Pesh. 328 (DB). PLD 1969 S. C. 194-21 DLR S. C. 145.]

Proper Dower :

Proper dower is the dower of a woman which is determined in keeping with the dower settled upon other female members of her father's family. In determining proper dower regard shall be had to the dower settled upon other female members of the father's family such as father's sisters,

her own sisters and her paternal first cousin sisters. In determining the proper dower regard shall also be had to the age, comeliness, education, sagacity, religiousness and good breeding of the ladies concerned.⁸ It is also laid down in *Fath al-Qadīr* that, in determining the proper dower, regard shall also be had to the lineage and property of the husbands of those women.⁹ According to the present writer, if the woman has some personal qualifications that too should be taken into account.

Proper dower—what is : The criterion for determining “proper dower” is the social position of the woman’s family, wealth of the husband, the wife’s personal qualifications, the circumstances or time and condition of society and the husband’s status ; where an excessive dower is promised but proved to be only “for show” or where no dower is proved to have been fixed at marriage, “proper dower” should be paid. Where a dower excessive in respect of the means of the husband is promised in earnest, the court cannot reduce it to a “reasonable figure” except on proof of a custom to the contrary. [34 PWR 1912 : 52 PLR 1912 : 13 Ind. Cas. 73 (DB).]

Section 64. If dower is not mentioned in the contract of marriage, it being a legal requisite, proper dower shall be deemed to be incumbent on the man.

Dower's
indispensability

Explanation : If the marriage is contracted with the condition that there shall be no dower, the condition shall be void and proper dower shall be deemed to have become due.

COMMENTARY

Dower, according to Ḥanafis, is a condition precedent to the lawfulness of the marriage contract. According to them, therefore, a marriage contract without dower is not lawful. According to Imām Shafi‘ī, dower is no condition for marriage contract and without dower a marriage contract shall be valid.

Nature of incidence :

In case a woman marries herself to a man and the man does not settle any dower for her or maintains silence on the question of her dower or marries her on the condition that she shall get no dower and the woman agrees to it, contract even then, according to Hanafis, on ground of the marriage itself, proper dower shall become due and the woman shall be entitled to demand proper dower. If the woman dies before consummation has taken place, proper dower shall be recoverable from her husband. If

⁸ Ubaydullah b. Mas‘ūd : op. cit. vol. ii, p. 44.

⁹ Ibn al-Humām ; *Fath al-Qadīr*, Cairo, vol. ii, p. 471.

the husband dies before consummation, even then the woman shall be entitled to get her proper dower which shall be realisable from the estate of her deceased husband. According to Imām Shafi'ī, however, proper dower on the basis of marriage itself does not become due. Dower, according to him, becomes due in two events only : One when it is a fixed dower and the other when consummation has taken place. If it is not a fixed dower and one of them dies before consummation then according to Imām Shafi'ī, even proper dower shall not become due. In cases of consummation according to all the jurists, proper dower shall become due. If the dower is not fixed and the divorce is given before consummation, then, according to the unanimous view of the *a'immah*, proper dower shall not become due, instead only a suit of clothes shall be due.

Validly of marriage without fixing dower :

There is no difference among the jurists on the point that a marriage contract, without mentioning dower, is valid. Similarly a marriage contract, even with denial to pay dower is also valid. For Allāh has said, "There is no blame on you if ye divorce women before consummation or the fixation of their dower."^{9a} It is proved from this verse that divorcing the wife, contracted into marriage in which no dower is fixed, is no sin. As a divorce follows only after a valid marriage contract, the verse is in support of the effectiveness of the marriage contract without the dower being fixed.

Imam Shafi'ī's argument : Imam Shafi'ī in support of his argument puts forward the Qur'ānic verse ^{9b} "وَأَتُوا النِّسَاءَ صِدُقَاتِهِنَّ نِحْلَةً" "And give the women (on marriage) their dower as a free gift." He argues that God has expounded *mahr* as *nahlah* and *nahlah* indicates gift. Dower, in fact, is a consideration in excess, which accrues in addition to and not on the basis of the marriage contract itself. According to him for the fulfilment of the purposes of marriage contract, creation of valuable consideration is not necessary. Dower is an additional liability which envisages for woman a remuneration in excess and so without a settlement it cannot be made incumbent upon man (except where consummation has taken place). According to Imam Shafi'ī, therefore, dower shall not become incumbent merely on the basis of the marriage contract itself without being specifically settled.

Hanafīs argument : Hanafīs in support of their argument put forward the Qur'anic verse, "Except for these, all others are lawful provided you seek

^{9a}Al-Qur'ān, surah *Al-Baqarah* (The Cow), ii : 236,

"لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَقْتُمْ نِسَاءَكُمْ مِمَّا لَمْ تَمْسُوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً" -

^{9b}Al-Qur'ān, surah *Al-Nisā'*, (The Women) iv : 4.

(them in marriage) with gifts from your property.”^{9c} They argue that Allāh has made women lawful on condition of property being given to them. Marriage contract, therefore, without the fulfilment of the stipulation that property be given, shall not be valid. The women have been made lawful on condition of property being given to them. Hence without that stipulation they cannot become lawful. Uterus and life, according to Ḥanafīs are objects of reverence. Permission to deal with them depends on the condition prescribed. In spite of the absence of that condition of dower in the marriage contract, therefore, their original reverence shall stand on its own. Thus, if there be a condition that there shall be no dower fixed in the marriage, the condition shall be void and proper dower shall become incumbent upon the man.

The Hanafīs, in support of their point of view also cite the following tradition.¹⁰ “*Alqamah* narrated a tradition from ‘Abdullah b. Mas‘ūd that a person asked him about the dower of a woman whose husband died before fixing her dower. He felt perplexed. He said, “I find nothing about it either in the book of Allāh nor have I heard anything from the Prophet about it. I, therefore, give opinion on my own *ijtihād*. If I am right it is from Allāh, if I am wrong it is from me and Satan. Allāh and His Prophet are exonerated.” ‘Abdullah b. Mas‘ūd, thereupon, said, such women shall have treatment like that of other women.” The man having heard the *fatwa* (legal opinion), stood up and said, “I bear witness that the Prophet in the case of Bur‘ bt. Washuq al-Ashja‘iyyah had given the same decision.” Then arose a man of Ashja‘ tribe and said, “I bear witness to this fact”. ‘Abdullah b. Mas‘ūd finding his decision in accord with the decision of the Prophet was highly pleased. So pleased never was he after his embracing Islam.” This means she will be entitled to proper dower.

The Ḥanafīs, in support of their point of view further argue that the objects of marriage cannot be gained without its being permanent. And permanency in marriage cannot be gained without the dower being incumbent. If the dower be not incumbent in marriage it will be easy for men, in their wrath and anger, to pronounce divorce. The incumbency of dower, therefore, is a means of gaining the object and rationale of marriage contract, which is realised by mutual conformity and this mutual conformity is not gained till the dower of woman is not venerated and respected by man.

^{9c}Al-Qur’ān, surah *Al-Nisā’* (The Women), iv : 24,

”واحل لكم ما وراء ذلكم ان تبتغوا باسوالكم“

¹⁰This tradition has been narrated by Imām Abū Ḥanifah from Hammād and Hammād has narrated it from Ibrāhīm Nakh‘ī. See *Muwatt‘ā’* by Al-Shaybānī, op. cit. p. 245.

Rejoinder to Imam Shafi'i : The Ḥanafī jurists discussing Imam Shafi'i's view about dower being a gift, say that the word, "*naḥla*" in fact has been used in the meaning of faith and religion. Hence the said Qur'ānic verse, being directory in nature, is really a proof of the commandment to pay dower with piety and dutifully. Dower is not a mere gift which depends on the will of the donor.

Analysis :

The real cause of difference of opinion between Ḥanafī and Shāfi'i jurists is that Ḥanafī jurists recognise the marriage contract itself as the basis of the dower becoming due whereas the Shāfi'is consider consummation to be the basis of dower becoming due.

The Ḥanafīs contend that man's right over woman's uterus is created simultaneous with the marriage contract and as the consideration implies the proof of proprietorship, rights should be created against each other at the same time. For instance, in the matter of "sale" the consideration money becomes due on account of the execution of the sale deed and becomes payable at once to the seller on his demand. In the same manner when the marriage contract is entered into the woman's dower becomes incumbent upon the man.¹¹

Dower — a religious ordinance :

Dower, like consideration money in a contract for sale, is not merely a monetary consideration. Its mandatory nature, in the religious law, is meant to maintain the respect, honour and dignity of the wife. Thus, even if it is not mentioned in the marriage contract, proper dower shall become incumbent. Even if it is settled that there shall be no dower in the marriage contract, dower shall become incumbent and the condition shall be void.¹²

Pakistan Law :

Marriage between muslim Pakistani male and Christian woman in England, no dower stipulated, woman entitled to dower : "Where a case involving the question of competence to divorce was decided on the footing that the Muslim husband was entitled to treat the marriage with a Christian woman, solemnized in England before a Registrar, as one governed by Muslim Law, the wife would in her turn have the right to claim dower from him, although no dower had been fixed initially, at the time of the marriage. The dower in such circumstances would be assessed as *mahr al-mithl*, that is the dower which would be payable to a woman of similar status and circumstances." [PLD 1967 S. C. 580 ; 20 DLR (SC) 27.]

¹¹ Al-Kāsānī, 'Alā al-Dīn : *Badā'i' al-Ṣanā'i'*, Cairo, vol. ii, Kitāb al-Nikāḥ, p. 245.

¹² Ubaydullah b. Mas'ūd : op. cit. vol. ii, p. 34.

Section 65. The liability of the payment of dower is directly of the husband except when he, during his minority, has been got contracted into marriage by his guardian. The liability in that event shall be that of the guardian.

Liability of
dower

Explanation : If the husband, on attaining majority, maintains the marriage intact, the liability of the dower shall be that of the husband and the guardian shall stand exonerated.

COMMENTARY

According to *Shari'ah* a minor is incapable of contracting his marriage. His guardian may, however, contract his marriage on his behalf. In that case, the liability of the dower remains that of the guardian. In case the minor dies, his guardian shall be liable to pay the dower to his widow. This rule of law is based on the principle that a minor cannot be burdened with financial liability by the act of his guardian.

The guardian's liability for the dower, however, ceases if the boy on attaining his age of majority accepts that marriage.

Section 66. In case of non-specification of the kind of dower as to its mode of payment in a marriage contract the whole of it shall be deemed to be prompt dower.

Non-specification
of the kind of
dower

COMMENTARY

According to the *Shi'ahs*, if no time is fixed for the payment of dower the whole of it shall be taken to be prompt.¹³ According to *Ḥanāfīs*, the preferred opinion as expounded by jurists is that the matter should be decided in the light of prevalent custom.¹⁴ The court, according to them, in the particular circumstances of each case, should decide how much of the dower shall be prompt and how much deferred. According to some *Ḥanafī* jurists the prompt dower should be one-third, and according to some other jurists one-fourth. But this proposition is not acceptable to the jurists in general and is now obsolete.

¹³ *Amīr Alī : Muhammadan Law, Lahore, 1965 vol. ii, p. 400.*

¹⁴ *Ibn al-Humām : Fath al-Qadīr, op. cit. vol. ii, p. 473 ; Ibn Nujaym : Baḥr al-Rā'iq, op. cit. vol. ii, p. 191 ; Ibn al-Ābidīn Radd al-Muḥtār, op. cit. vol. ii, p. 368.*

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Imam 'Alā' al-Din Al-Kasani a renowned Hanafi jurist dealing with the question has written in his famous book *Badā'i' al-Ṣanā'i'*, "If there is no specification that the dower is prompt or deferred, the entire dower shall be assumed to be prompt.¹⁵" This view is the more correct because the marriage is a kind of "contract with consideration". And a "contract with consideration" requires the parties to be on equal footing. After proposal and acceptance, when the man's right of enjoyment over woman is established (because of the contract), the woman's right of realising the dower from the man is also established. The principle that if there is no settlement about the time of payment of the dower in the marriage contract, the whole amount of dower should be assumed to be prompt i.e. payable on demand, in the absence of anything to the contrary, appears to be based on equity and justice.

Indo-Pakistan Law :

Prompt and deferred : Where there is no stipulation as to whether the dower is to be prompt or deferred at the time of the marriage, a portion must be considered prompt and such portion is to be determined with reference to custom and in the absence of custom with reference to the status of the wife and the amount of the dower. [(1910) 33 All. 291 : 8 ALJ 27: 9 Ind. Cas. 200 (DB)].

Fixing of proportion-discretion of Court : Where no particular portion of the dower has been declared to be prompt at the time of the marriage, the Court should fix the proportion to be treated as the prompt dower having regard to the status of the family, the amount of the dower and custom, if any, prevailing in the plaintiff's family. [AIR 1931 All. 403 : (1931) ALJ 167 : 131 Ind. Cas. 115 (DB)].

Determination of amount of prompt dower, parties not poor, no custom, dower Rs. 51,000—Rs. 12,000 held suitable prompt dower : The proportion of prompt dower is regulated by custom and, in the absence of custom, by the status of the parties and the amount of dower settled. Where the parties, though not especially wealthy were at any rate well off and could not be said to have been poor for the status occupied, and there was no evidence showing that there was any custom, out of the amount of dower which was Rs. 51,000, Rs. 12,000 were held suitable as prompt dower. [AIR (Vol. 30) 1943 All. 184 : (1943) ALR 37 : ILR (1943) All. 295 ; 207 Ind. Cas. 519 (DB)].

Determination of one-fifth as prompt dower : In determining the amount of prompt dower the essential matters to be considered under

¹⁵Al-Kāṣānī : op. cit. vol. ii, p. 288 :

”لو كان سكوتاً عن التعجيل والتأجيل لان حكم المسكوت حكم المعجل“

the Muhammadan Law are the status of the woman and the amount of the dower which was fixed. But it is also permissible to the Court to look to other circumstances in the case and, if the amount of dower happens to be unduly excessive and high, the Court can take judicial notice of the fact that the amounts of dowers in the province are often fixed at a notoriously high figure beyond the means of husbands with a view to act as a check to divorce or with a view to keep up the family custom and for the sake of dignity rather than with any intention of exacting payment.

The plaintiff came from a poor family, her father was a mere *karindah* of a landlord and at the time of his death, he was bankrupt. The amount of dower was fixed at Rs. 80,000. The plaintiff left her husband's home without any justifiable cause. It was thus held that no purpose would be served by taking as precedent the proportion fixed in reported cases. Each case will have to be considered on its own merits. Having regard to all the circumstances of the case, Rs. 16,000 was an adequate proportion to fix as prompt dower. [AIR (Vol. 28) 1941 All. 181 : (1941) ALJ 118 : 1941 OWN 283 : 1941 AWR 75 : ILR (1941) All. 326 : 194 Ind. Cas. 353 (DB)].

Prompt or Deferred—Rule for determination : If it is not stated in the *kabin-nama* whether the dower is prompt or deferred, the custom or usage of the wife's family or the locality is in the first instance to determine what portion of the unspecified dower is to be prompt and what deferred, and in the absence of proof of any custom a presumption may be raised that one-half of the amount stipulated is prompt and the other half deferred, but this presumption can be rebutted by either party and the proportion may be increased or reduced in accordance with the circumstances of each individual case. In considering those circumstances the status of the wife and the amount of the dower must be taken into consideration. [AIR 1948 Lah. 135 : ILR (1947) Lah. 465 (FB)].

Pakistan—Modern Legislation :

The controversy has now been resolved in the current law of Pakistan Muslim Family Laws Ordinance, 1961. Under Section 10 of the said Ordinance, it is laid down, "When no details about the mode of payment of dower are specified in the *nikāḥnāmā* or the marriage contract, the entire amount of dower shall be presumed to be payable on demand." This legislation is in accord with the observation of the renowned Hanafī jurist Al-Kāsānī and the Shī'ahs as stated above.

Section 67. Half of the dower shall become due on the pronouncement of divorce or dissolution of marriage contract without valid retirement.

Incidence of
dower in case of
divorce or disso-
lution of marriage
without valid
retirement

Explanation : (a) If no dower has been fixed the woman shall get only a suit of clothes.

(b) If the responsibility for the dissolution of marriage contract before valid retirement is that of the woman she shall not be entitled to get any dower.

COMMENTARY

If the divorce is pronounced prior to the valid retirement¹⁶ and the dower be a fixed one, then half of it shall become due.¹⁷ Allah says in the Holy Qur'an, "And if ye divorce them before consummation but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it. Or (the man's half) is remitted by him in whose hands is the marriage-tie."¹⁸

In case of specified dower, on the dissolution of marriage contract before valid retirement half of the dower shall become due. If, prior to valid retirement, separation between the parties takes place for which the responsibility lies with the woman, e. g. she happens to commit an act that occasions the prohibition of affinity or she turns an apostate,¹⁹ she shall not be entitled to get any dower.

If, at or after the marriage contract, no dower is fixed and divorce is given prior to valid retirement, then according to Hanafīs, in such cases the woman shall be entitled to get only a suit of clothes as a gift.²⁰ According to Shi'ī fiqh, however, the woman shall be entitled to get proper dower. The basis of the Hanafīs view is the following Quranic verse :

” لا جناح عليكم ان طلقتم النساء ما لم تمسوهن او تفرضوا لهن فريضة ومتعوهن على الموسع قدره وعلى المقتر قدره ماعاً بالمعروف ، حقاً على المقمين “

i.e. "There is no blame on you if ye divorce women before consummation or the fixation of their dower, but bestow on them (a suitable gift) ; the wealthy according to his means, and the poor according to his means, a gift of a reasonable amount is due from those who wish to do the right things."²¹ The view point of Hanafīs, in this regard, appears to be in accord

¹⁶See Chapter VIII on "Valid Retirement" *infra*.

¹⁷Ibn al-‘Ābidīn : op. cit. vol. ii, p. 340 ; Ibn al-Humām : op. cit. vol. ii, p. 439.

¹⁸Al-Qur’ān, surah Al-Baqarah (The Cow), ii : 237,

” وان طلقتموهن من قبل ان تمسوهن وقد فرضتم لهن فريضة فنصف ما فرضتم الا ان يعفون او يعفو الذي بيده عقدة النكاح “-

¹⁹Al-Jazārī : op. cit. *Kitāb al-Mahr*, vol. iv.

²⁰Ibn al-‘Ābidīn : op. cit. vol. ii, p. 344.

²¹Al-Qur’ān, surah Al-Baqarah (The Women), ii : 236.

with the biddings of the Qur'ān in as much as the word *متعوهن* which is derived from the word *متعّة* meaning thereby a qamiṣ, izār and ridā, i.e. suit of three clothes for a woman, is a pointer to this.

Indo-Pakistan Law :

Divorce before Consummation—Prompt dower : If the husband divorces his wife before consummation she receives half of her specified dower even if the dower was prompt. [AIR (Vol. 27) 1940 Mad 888 : (1940) MWN 864 ; (1940) 2 MLJ 345 : 52 LW 369 : 191 Ind. Cas. 728 (DB).]

Section 68. Dower, in the following cases, shall become per-emptory and the whole shall become payable :—

Incidence of
dower after
valid retirement

On Cohabitation—

- (a) After valid retirement ;
- (b) On the death of either of the couple.

COMMENTARY

The whole of dower does not become payable merely on marriage contract. Indeed, the whole of dower becomes payable after valid retirement. The Hanafīs and Malikis agree on this. In support of their view, there are, amongst others, the following traditions on which the Sunni jurists have reached a consensus :

Traditions :

1. Dār Qutnī narrated from Muḥammad b. 'Abdul Raḥmān b. Thawbān that the Prophet has said, "The person who removes the veil of a woman and looks at her, the whole of the dower becomes due on him, whether the act of penetration takes place or not."²²
2. It is narrated from Sa'īd b. al-Musayyib that 'Umar has ordered that a man when he after marrying a woman uncovers her veil the whole of dower shall assuredly become due on him.²³

²² Ubaydullah b. Mas'ūd ; op. cit. vol. ii, p. 37 (marginal note).

” قال النبي صلى الله عليه وسلم من كشف خمار امرأة نظر اليها فقد وجب الصداق دخل بها اولم يدخل “

²³ Imām Malik b. Anas : *Muwaḥḥid* (*Sharh* by Zarqanī), Cairo, vol. iv, p. 17 :

” حدثني يحيى ، عن مالك ، عن يحيى بن سعيد ، عن سعيد ابن المسيب : ان عمر ابن الخطاب قضى في المرأة اذا تزوجها الرجل انه اذا ارخيت الستور فقد وجب الصداق “

3. Zayd b. Thābit said if a man goes to a woman and the veil is lifted assuredly the whole dower shall become due.²⁴

Full dower becomes due :

In case of irregular marriage : Admittedly, there is a consensus of opinion among Muslim jurists that payment of entire dower becomes incumbent on actual penetration.^{24a} According to Ḥanafīs (and also Mālīkīs)^{24b} however, valid retirement is equivalent to cohabitation, in certain matters. If there has been valid retirement, according to them, the entire dower becomes incumbent. It does not matter whether cohabitation has taken place or not. According to Shāfi'īs and Shi'ahs, however, retirement is not equivalent to cohabitation.^{24c}

In case of Irregular marriage :

In case of irregular marriage, however, valid retirement according to Sunnis, shall not be the substitute of sexual intercourse. An irregular marriage does not necessarily lead to sexual intercourse. In the case of an irregular marriage therefore no dower for woman shall become due without sexual intercourse.²⁵ Hence if the woman divorced prior to the sexual intercourse in an irregular marriage, no dower shall become due to her.

Section 69. In case of divorce or dissolution of marriage contract after valid retirement the entire dower becomes due at once.

On divorce after
valid retirement
full dower
becomes due

COMMENTARY

According to Ḥanafīs and Mālīkīs, the dower, on account of valid retirement, becomes peremptory and mandatory. If divorce is pronounced or the marriage contract is dissolved, after valid retirement, the entire dower

²⁴Imām Muhammad : *Muwatṭā'*, Karachi, p. 239 :

” اخبرنا مالك اخبرنا ابن شهاب عن زيد بن ثابت قال اذا دخل الرجل بامرأة وارخيت الستور فقد وحب الصداق “

^{24a}Al-Kāṣānī, Bad'ai' al-Ṣan'ai' Cairo, 1924, Vol. ii, page 292 :

” اما المهر يتاكد بالدخول فمتفق عليه “

^{24b}Al-Kāṣānī, Bad'ai' al-Ṣan'ai' Cairo, 1924, Vol. ii, page 291 :

” واما التاكيد بالخلوة فمذهبنا وقال الشافعي لا يتاكد المهر بالخلوة لو خلا بها خلوة صحيحة “

^{24c}Fatawa al-Alamgiriyyah, Dewband, Vol. ii, page 20 :

” وخلوة الصحيحة ان يجتمعا في مكان ليس هناك مانع يمنعه من الوطى حساً او شرعاً او طبعاً “

²⁵Ibn 'Ābidīn : op. cit. vol. ii, p. 359 :

” يجب المهر المثل في نكاح فاسد بالوط في القبل لا بغيره كالخلوة لحرمة وطئها “

shall at once become due, whether it be prompt or deferred. The basis of the principle is that the marriage contract because of divorce or dissolution, comes to an end. Hence it becomes obligatory that the dower be paid at once.

Impotency and liability of Dower :

The impotency of a husband shall not affect the consequence of a valid retirement in so far as it relates to his liability of payment of dower. If the marriage is dissolved by Court or by divorce, after valid retirement, the wife shall be entitled to her full dower. This is according to Ḥanafī law. In Shī'ī law she is entitled to only half as, according to them, valid retirement is not equivalent to cohabitation. In case the marriage is dissolved before valid retirement the rule of wife's entitlement to half dower shall be applicable. There is a consensus of all the jurists in this respect. (For further details see under "Valid Retirement" Chapter VIII, *infra*).

Section 70. In the event of the death of one of the spouses during the continuance of a valid contract of marriage the entire dower shall become payable irrespective of the fact whether valid retirement has or has not taken place.

Incidence of
dower in the
event of death

COMMENTARY

As death of one of the spouses ends the marriage contract and relationship is broken off for ever, the entire dower becomes due on the man, whether valid retirement has taken place or not.²⁶ However in case of an irregular marriage if valid retirement has not taken place and the death of one of the spouses ensues no dower shall become due.

If the dower is deferred or a period is fixed for the payment of dower but before its expiry, a revocable divorce is given, dower shall at once become payable, irrespective of the fact that the husband, after that, might have revoked the divorce. The dower which has once become payable as prompt, cannot be deferred again for any period.²⁷

Section 71. During the continuance of marriage :

Reducing or
augmenting the
Dower

- (a) the wife may reduce her dower ; or
- (b) the husband may augment the fixed dower.

COMMENTARY

There is a consensus of opinion among the jurists that the wife may reduce her dower.²⁸ This reduction, however, must be voluntary. If it

²⁶Ubaydullah b. Mas'ūd : op. cit. vol. ii, p. 34 (marginal note).

²⁷Fatāwā 'Alamgīriyyah, op. cit. vol. ii, p. 34.

²⁸Ibid, p. 25.

is reduced under compulsion or is reduced unwillingly it will not be valid. Likewise, if the woman is on her death bed and in that condition she reduces her dower, it shall not be valid.²⁹

The husband is entitled to augment the fixed dower of his wife.³⁰ If separation before cohabitation takes place, only the half of the dower fixed shall become due. No reliance in such a case shall be placed on any augmentation except when the augmentation is so connected with the fixed dower as is the tree attached to the earth.

Indo-Pakistan Law :

Mahr can be added to : At any time during the continuance of the marriage an addition may be made to the *mahr* ; the husband's promise to add to the *mahr*, if accepted by the wife, becomes incorporated into the marriage contract and binds him. [AIR 1944 All. 214 : (1944) ALJ 360 : 1944 AWR 188 (2) L 1944 OWN 98 : ILR (1944) All. 325].

Increase of dower during continuance of marriage : In the case of a Muhammadan woman, it is open to the husband to fix the dower at any time before or after the marriage. It is further open to the husband to increase the amount of the dower at any time during the continuance of the marriage. For the purposes of increasing the dower, a declaration by the husband is quite sufficient under the Muhammadan Law. [AIR 1940 Lah. 104 : 189 Ind. Cas. 725].

It can be fixed any time before or after marriage, whether can be increased, decreased during continuance of marriage : Not only the amount of dower can be fixed at any time before or after marriage, but the amount so fixed can be increased at any time during the continuance of marriage. [AIR 1935 Lah. 816 : 160 Ind. Cas. 805 (DB)].

Dissolution of marriage at instance of wife, effect of dower amount, if can be reduced : A Court of law has no power to decrease or increase the contracted amount of dower. Where there has been divorce, whether the dower was prompt or deferred is immaterial, since the dower, if not already paid, becomes due at once. [AIR 1917 Pat. 318 ; 40 Ind. Cas. 627 (DB)].

Reduction of dower by Court : Where a sum has been promised as dower and the parties really intended it to be paid on occasion arising, the Courts will not reduce it *ad misericordiam*, or because the husband is poor ; but where a sum named was merely nominal, the promise will not be enforce-

²⁹Ibn Nujaym : op. cit. vol. ii, pp. 161-62.

³⁰*Fatāwā 'Alamgīriyyah*, op. cit. vol. ii, p. 25.

able, [14 PR 1912 : 157 PLR 1912 : 96 PWR 1912 : 14 Ind. Cas. 486 (DB)].

Section 72. A woman who is a major has herself the authority of realising her dower. If she is minor her father, and in his absence her near guardian, may realise the same.

Authority of realising the dower

COMMENTARY

Islam recognizes women's right of holding property. The dower amount exclusively belongs to her and she has every right of claiming and recovering it from her husband. In case she is minor, her father, and in his absence her near guardian, is entitled to realize it from her husband, on her behalf.

Pakistan Law :

Dower debt suit may be filed at place where wife resides : It is undisputed that in Muslim law the dower is a debt which is owed by the husband to the wife. Accordingly the ordinary principle of payment of debt should also govern the case relating to the realisation of dower debt. Therefore if the contract does not stipulate to the contrary, then it is the duty of the debtor to find out the creditor and to make payment at a place where the creditor resides. If this general principle is accepted as well settled then there is no reason why the same should not be applicable in the case of a Muslim wife who is litigating for realising her dower debt. There are authorities to support the proposition that in the case of a suit for realisation of dower debt, the same is maintainable in a Court having jurisdiction where the wife resides. [1970 DLC 560 ; 22 DLR 677 (DB)].

Section 73. A wife who is major has the authority of making a gift or remission of the entire or a part of her dower.

Authority of wife of making a gift of her dower

Explanation : If the wife is a minor, her guardian is not entitled to remit or make a gift of her dower in favour of her husband.

COMMENTARY

As the wife has proprietary right over her dower she is completely entitled, before or after consummation, to remit or make a gift of the whole or part of her dower, whenever she likes in favour of her husband or in favour of any other person. Her guardian has no right to object to it.³¹

³¹Fatāwā 'Alamgīriyyah, op. cit. vol. ii, p. 27.

This gift must, however, be voluntary.³² Gift may be made even after the death of her husband. But during child-birth agony when her life seems at stake her making a gift shall be invalid.³³

The wife is entitled also to make a conditional gift or remission of her dower. If the condition is fulfilled the gift is complete, if not the gift shall not take effect and the dower, as before, shall stand. If the condition is invalid, it shall be null and void and the gift shall stand valid.

If the wife is a minor, her guardian is not entitled to remit or make a gift of her dower in favour of her husband. It is the bounden duty of the guardian to protect the rights of minor, not their violation. Such act of the guardian shall be contrary to the basic concept attached to the office of guardianship. It cannot affect the right of the minor with respect to dower.

Section 74. The wife, till the non-payment of her prompt dower, shall be entitled to refuse to live with her husband and submit to conjugal obligation, though previously cohabitation may or may not have taken place.

Wife's refusal to
restitution of
conjugal rights
for non-payment
of prompt dower

COMMENTARY

All the *a'imma*h and jurists concur altogether on the point that the wife, as long as she has not submitted herself to her husband, is entitled, on account of the non-payment of prompt dower, to refuse to live with her husband and submit herself to cohabitation with him.³⁴ They, however, differ on the point : in case a husband has cohabited with his wife or has had valid retirement with her, whether after that, the wife has the right to keep off the husband from exercising his conjugal right over her till the prompt dower is paid to her. According to Imām A'zam (Abū Ḥanīfah) in such condition as well, the wife has that right but according to Ṣaḥībayn she does not have any such right.³⁵ According to Imām Mālik and Imām Shafī'ī also the wife has no such right. Imām Aḥmad b. Ḥanbal is reported to have withheld his opinion about the question. But among the Ḥanbali jurists, Abu Abdullah b. Baṭṭah and Abu Ishāq Shāmlah are convinced of the non-existence of such right on the part of wife, whereas 'Abdullah b. Hāmid, who is a noted traditionist and has the rank of an authoritative jurist amongst the Ḥanbalīs, agrees with the view-point of Imam Abū

³²Shah Bano Begum vs. Istikhar Mohammad Khan, P.L.D. 1956, Kar. 363.

³³Fatāwā 'Alamgīriyyah, op. cit. vol. ii, p. 27.

³⁴Fatāwā 'Alamgīriyyah, op. cit. vol. ii, p. 28-29.

³⁵Ibid.

Ḥanīfah and, on this point, he is convinced of the right of the wife.³⁶ Shī'ah jurists agree with the opinion of the Ṣāhibayn of Imam Abu Hanifah, viz. Imām Abu Yusuf and Imām Muhammed al-Shaybānī.

So far as the Ḥanafis' books of *fiqh* commenting on this question are concerned, the viewpoint of Imam Abu Hanifah has been recognised in *Tanwīr al-Abṣār* and *Kanz al-Daqa'iq* while the opinions and the difference of opinions of Imam A'zam and his companions have been discussed in *Hidayah*, *Baḥr al-Rai'iq*, *Sharh Wiqayah*, *Fath al-Qadīr*, *Taḥtawī* and *Radd al-Muhtār*. But the jurist authors have not expressed their own opinions. Imām 'Ālī' al-Dīn Al-kāsānī, indeed, has examined elaborately these different point of views in his notable book *Badā'ī' al-Ṣanā'ī'*.

Abu Hanifah's contention :

The principle that a wife, after once surrendering herself to her husband, can refuse the restitution of conjugal rights to him on the ground of the non-payment of her prompt dower is based on the analogy of conveyance by sale. As the buyer, in the matter of conveyance by sale, first tenders the consideration money and the seller, thereupon, makes over the possession of the property sold to the buyer, the wife, in the same manner, has the right to stop the husband from cohabiting with her till the *entire* prompt dower is first paid to her. As money is the consideration for the property sold, so is the dower for the person of the wife and as the seller has the right to retain the property sold till the payment of consideration money to him, so has the wife the right of stopping her husband from exercising power over her person till the payment of prompt dower is made to her. If the prompt dower is not paid the husband has no right to compel his wife to allow him to have marital relationship with her. The right of the husband of possessing the person of the wife arises alongwith the right of the wife of receiving her prompt dower from him. If the wife, therefore, demands the payment of her dower from the husband he has no right to have conjugal relationship with her till he has paid the dower. The husband, indeed, shall be entitled to the exercise of such right over her after the payment of her dower. If, however, even a penny of the prompt dower remains unpaid, the wife shall have the right of refusing conjugal relationship to him. The right of the availing of the person is not divisible. In case of any part of the prompt dower, (howsoever small) remaining due, therefore, the wife shall have the right to stop the husband from having sexual intercourse with her.

The Ṣāhibayn's arguments :

According to Imām Abū Yūsuf and Imām Muḥammad, the wife once allowing her husband to have control over her person cannot refuse the

³⁶ *Ibn Qudamah Al-Maqdisi : Al-Mughnī*, Cairo, *Kitāb al-Nikah*, 738.

conjugal relationship with him on the ground of non-payment of her prompt dower and has not the right of keeping herself away from him. The Sahibayn (Imām Abū Yūsuf and Imām Muḥammad) argue that the wife with her own free will and pleasure having once cohabited or gone on valid retirement with her husband makes over all of herself that has been contracted in marriage to the husband and surrenders herself completely to him. Hence her right, if any, of keeping herself away shall become a nullity. This transaction is similar to that of a seller who without realising the consideration money makes over the possession of the property sold to the buyer.³⁷

The other argument of the Sahibayn is that the entire dower after only one cohabitation becomes peremptory. After second, third or the fourth cohabitation the original dower is neither doubled nor trebled. Hence, further cohabitations are not in lieu of dower or of any thing else. As the dower after one cohabitation or valid retirement becomes peremptory the right of the wife of restraining herself on the ground of non-payment of her prompt dower also lapses after once allowing her husband to exercise his power over her person.

Argument against Sahibayn's view :

The dower, in fact, is the compensation for the use of the person of the wife that the husband enjoys and continues to enjoy it by having sexual intercourse. As the wife has the right of stopping her husband from having sexual intercourse with her for the first time, she has the same right of stopping him for the second or the third time. It is wrong to say that the wife's right or authority lapses after the first sexual intercourse. The real consideration is the entire prompt dower. That contract in its effect and consequences remains intact. The wife's allowing the husband once or more than once to have sexual intercourse with her does not necessarily mean that the wife has altered the contract of prompt dower and has, on account of the sexual intercourse, automatically wrought changes in its effects and results. Really it may more appropriately be called a temporary favour bestowed by the wife upon the husband, not that it is an act of divesting herself of her right. It is just a favour of temporary nature that does not affect, in its results, the original right of the wife. This bestowing of favour she may refuse at any time at her will and on the basis of her original right she may, till the prompt dower is not paid, keep off the husband from further enjoyment. To say that she is divested of her right

³⁷Al-Kāṣānī : op. cit. p. 289 :

وجه قولهما انها بالوط مرة واحدة او بالخوة الصحيحة سلمت جميع العقود عليه
برضاها وهي من اهل التسليم فبطل حقها في البضع

after once allowing her husband to cohabit with her, and that the right once divested cannot be revested in her is inapplicable in the present case. The wife, by allowing the husband's power over her person, is not divested of her right. It can at best be said that her right is delayed or put off to the extent of that act of sexual intercourse.

Another argument that may be advanced against the opinion of the Sahibayn is that the wife's right of withholding her person from her husband is created when on her demand prompt dower is not paid to her by the husband. If she, without making any demand for prompt dower, allows her husband to exercise power over her person the question of the lapse of right does not arise.

So far as the principle of the entire dower becoming peremptory after one sexual intercourse or valid retirement is concerned it is based on the fundamental rule that effects are created with respect to the events that have happened. The dower, therefore, becomes peremptory after one sexual intercourse. The entire dower, therefore, being peremptory after one sexual intercourse does never mean that the having of sexual intercourse for the second, third or the fourth time shall be without compensation by way of dower.

So far as the example of conveyance by sale cited in this respect is concerned, it has no application to the present question, in view of its special significance. The seller makes over the possession of the thing sold before or after receiving its consideration money. It is altogether different in the case of the use of the wife's person. The husband continues to enjoy the person of his wife. The wife therefore is in a position of putting a stop to his enjoyment. Besides, the principles of conveyances by sale that are applicable to things can have no application to persons and to their status. To deduce the same conclusions from them may be correct logically, but the theological effects that would emanate shall be quite inopportune and distinct, specially in the case of dower, wherein the capacity of the parties is not that of a seller and a buyer but that of a husband and wife. Besides, the dower is not merely a monetary consideration, it has religious sanction too.

The cause of difference :

The basic reason of the difference of opinion between the jurists on this point is this : The Sahibayn believe that the wife's right lapses by her once allowing the husband to have power over her person, whereas Imām Abū Ḥanīfah holds that her right does not lapse. It has only been delayed, for the time being.

Conclusion :

In view of the present writer, the said proposition of Imām Abū Hanīfah as against the viewpoint of other jurists appears to be sound and correct in the light of the above discussion and it ought to be preferred and followed. Irrespective of these juristic arguments two other contentions can be advanced in favour of his view: firstly, if the social order and proprieties and women's psychology be considered it would become clear that the wife's demanding her dower from her husband just after her marriage shall be regarded as an act of immodesty on her part. Hence, keeping in view social decorum as well, the wife's right ought to be maintained intact, though the husband might have cohabited with her. Secondly, how impractical it is that the wife has the right of realising her dower, but in the event of its non-payment she has not the right of keeping herself away from her husband. In view of the psycho-sociological complications that may arise in the event of the non-payment of dower by the husband and the wife's seeking redress from the Court, it is advisable and is in accord with justice that the wife's right, in the event of non-payment of her dower, of keeping herself away from her husband be maintained, irrespective of the fact whether the husband has cohabited with her or not.

Pakistan Law :

Prompt dower not paid on demand, wife may refuse to live with husband : It is true that unless she makes a demand for prompt dower the husband is entitled to conjugal rights, but if a demand for prompt dower has been made and the dower is not paid, the refusal of the wife to live with the husband would be justified, even though this is not assigned as a reason for her refusal. The husband being in default is not entitled to the exercise of conjugal rights and the failure of the wife to live with the husband cannot be a wrong. (1969 DLC 143-21 DLR 357).

In the present case while granting a decree for restitution of conjugal rights the trial Court directed the husband plaintiff to deposit prompt dower in the Court and allowed husband's prayer that its payment to wife be withheld till wife's arrival in husband's house.

Held : It is abundantly clear that a wife is entitled to refuse to live with her husband and to give her company as long as the prompt dower remains unpaid. By filing such petition, the plaintiff husband has clearly disentitled himself from the benefit of a decree for restitution of conjugal rights. (1970 DLC 276-21 DLR 838).

Prompt dower not paid, decree for restitution of conjugal rights may be refused : The non-payment of prompt dower has been regarded as a valid ground for refusing a decree for restitution of conjugal rights. (1970 DLC 276-21 DLR 838).

Wife not staying with husband may demand prompt dower, Court must decree it : A wife governed by the provisions of the Muslim Law not staying with the husband may demand prompt dower. (1970 DLC 276 ; 21 DLR 939).

Written statement in Court that prompt dower was not paid on demand, statement to be treated as notice of demand for prompt dower : Where in written statement by wife specific mention was made that prompt dower was demanded and the same had not been paid, it was held that the filing of a written statement in a matrimonial proceeding of this nature is taken note of as a notice for the demand of prompt dower. (1970 DLC 276 ; 21 DLR 838).

Analysis :

The trend of the decisions of the Courts of Indo-Pak. Sub-continent since long has been to the effect that after the demand of the prompt dower and its non-payment the wife has the right of refusing permission to her husband to live, and have sexual intercourse, with her. In the case of '*Abdul Qōdir Vs. Salīma Bī*',³⁸ the decree for the restitution of conjugal rights was made dependent on the payment of dower. This was followed in the case of *Saleh Bi versus Rafiuddin* (164 P.R. 1889) by the Punjab Chief Court. Bombay, Calcutta, Madras, the Punjab, and Dacca High Courts also followed this decision and passed conditional decrees for the restitution of conjugal rights provided the wife took the plea of the non-payment of her prompt dower.³⁹

Conclusion :

It is now settled law in Indo-Pakistan Courts that the wife may refuse to live with her husband in case of non-payment of her prompt dower even though sexual intercourse might have taken place earlier. This is also the practice in other Muslim countries like Egypt, Syria, Tunisia and others. The Tunisian Law specifically provides that "the husband cannot, unless he pays the dower, force the wife to consummate the marriage. After a marriage is consummated, dower shall constitute an unsecured debt of which only the wife can claim payment." (Art. 13).

³⁸(1886) I.L.R., 8 All. 149.

³⁹*Najmunnisa Begum vs. Sirajuddin Ahmad*, A.I.R. 1946, Pat. 467 ; *Rahim Jan vs. Mohammed*, P.L.D. 1955, Lah. 122 ; *Nooruddin Ahmad vs. Masooda Khanam*, P.L.D. 1957, Dacca 242 ; PLD 1959, Lah. 470 ; 1969 DLC 143 ; 1970 DLC 276.

Section 75. (1) Dower is a debt that takes precedence over Dower—a debt all rights acquired under a will or by inheritance.

(2) The widow on the death of her husband can realise her dower from the property of her deceased husband.

COMMENTARY

The dower, in fact, has the features of a debt. It does not, in case of its remaining due, lapse on the death of the husband. The widow is entitled to realise her dower from the property of her deceased husband. The dower, however, is an unsecured debt except when there is an acknowledgement deed from the deceased husband or a court's decree securing the dower on the property of the deceased husband.

The heirs of the deceased are not personally bound to pay off the dower debt. They are responsible to pay it, like other debts of the deceased, out of their shares in the property they have actually inherited. The dower debt, however, shall get preference over all the rights acquired under a will or inheritance, as it is clear from the Qur'ānic mandate. (IV: 11, *Al-Nisā'*). If the deceased leaves behind no property from which the dower debt can be realised it will lapse, as unrealizable.

Decisions that Indo-Pak Courts have given from time to time with respect to the widow's dower debt having precedence over all rights under will and inheritance with respect to its payment are generally in accordance with the religious injunctions.⁴⁰

Pakistan Law :

Dower is not hiba bil-iwaz, transfer of immovable property in lieu of dower not a gift but alienation in favour of wife : "The dower is paid by the husband to the wife, firstly, to acquire religious merit, and secondly, to discharge an obligation or duty towards the wife. This is why, in common parlance, we call it '*haq-e-Mahr*'. It therefore seems that dower cannot be called *hiba bil-iwaz*, without doing violence to the institution. This is a misnomer. That the dower is an obligation for the wife's consent to *nikah* is apparent from the fact, that it may become due in certain cases even without consummation. It is payable even if it has not been specified at the time of *nikah* and further, it is payable to the wife herself. To call an obligation a '*hiba*' is, therefore, travesty of truth." [PLD 1972 Pesh. 37 (DB).]

⁴⁰*Kassim Husain vs. Habibur Rahman* (1929) I.A. 254-58 ; 8 Patna 926 ; 117 I.C. 10-56 ; 1929 A.I.R. P.C. 174 ; *Mohammad Wahid vs. Bazaat Husain* (1878) 5 I.A. 211, 223, 224 ; 4 Cal. 302.

Property transferred to wife as dower : “The mere right to appropriate produce from a certain land till the lifetime of the wife, cannot be a subject-matter of dower. This is certainly a contradiction in terms that though some specified land was being given in dower as ‘*haq-e-Mahr*’ yet the wife could only enjoy it till her lifetime or re-marriage. The payment of dower is an obligation under the *nikāh* and for this very reason, it cannot be qualified with the duration of the marriage. It becomes due in full amount, no sooner the marriage is consummated and conditions imposed on it in that matter are invalid.” [PLD 1972 Pesh. 37 (DB.)]

Section 76. The widow shall have the right to maintain her possession over the property of her deceased husband till her unpaid dower debt is paid to her.

Widow's possession of her deceased husband's property in lieu of her unpaid dower

Explanation : The fact that the widow is in possession of the property of her deceased husband in lieu of her dower debt is no bar to her suing the heirs of the deceased for the realisation of her dower debt.

COMMENTARY

If the wife, during the life-time of her husband, is in exclusive possession of a property or a part of property of her husband, she, on the death of her husband, has the right, without the assent of the heirs, to remain in undisturbed possession of the same till the payment of her dower debt is made to her, provided her possession must have been acquired validly without coercion or deceit. Provided further that the possession must not be that of a mortgagee nor should it be such that it may create proprietary right in her favour. The widow, during her possession over the property, shall simultaneously have the right of suing the heirs for the realisation of her dower debt.

In the event of filing a suit for the realisation of her dower debt, she shall have to express her willingness to give up her possession (on the basis of the dower being due of the property at the realisation of her dower debt.⁴¹

Presumption about possession : The presumption under the Muslim Law is that when a widow has been in possession of her husband's property during his lifetime and has continued to be so for some time after his death, her possession has been lawfully obtained and is in lieu of her dower. (AIR

⁴¹*Mina Bibi vs. Chaudhry Vakil*, (1925) 52 I.A. 145 ; 47 All 250 ; 86 I.C. 579. But she is entitled to receive her inherited share in her husband's property independent of her dower's debt.

1934 Cal. 210 ; 149 I.C. 115 ; AIR 1935 Oudh 68 ; 153 I.C. 93 ; also see AIR 1936 All. 528 ; 164 I.C. 290).

Adverse possession : If a Muslim widow entitled to dower has not obtained possession lawfully, she cannot have widow's lien by taking possession of the property adversely to the other heirs. (A.I.R. 1939 All. 348 ; 182 I.C. 801). A widow is liable to account to the other sharers with regard to the income received by her from her husband's property as any other co-sharer would be, if he is in possession of property of more than his share. (AIR 1961 A.P. 428 ; AIR 1942 Pesh. 92).

When the right of retention arises : The right of retention of husband's property in lieu of dower arises for the first time on the termination of the marriage either by the death of the husband or by divorce but there is no such right during the continuation of the marriage. (AIR 1940 Cal. 578 ; AIR 1923 Mad. 57 ; 69 I.C. 977 ; AIR 1931 Oudh. 63 ; 130 I.C. 113).

Consent of husband or his heir not necessary for lien of widow : There is a difference of opinion in the Courts about the right of the widow to retain possession of her deceased husband's property when she has not obtained such possession with the consent of the husband or his heirs. The confusion has arisen because in *Hamira Bibi's* case (AIR 1916 P.C. 46), it was observed by their Lordships of the Privy Council that, "If she (the widow) lawfully, with the express or implied consent of the husband or his heirs, obtains possession of the whole or part of his estate.....she is entitled to retain possession until it (dower debt) is satisfied." In that case it was admitted that the widow had entered into possession with the consent of the heirs. It is respectfully submitted that observations on the point were *obiter*. But the High Court of Calcutta (AIR 1924 Cal. 508 ; 80 ; I.C. 294), held that it was not *obiter* and that the Privy Council was defining the right of the widow to retain possession and therefore held that the consent of the heirs of the husband was necessary to give the widow the right of retention. Patna High Court took the same view. (AIR 1942 Pat 210; 197 I.C. 241). Their Lordships of the Privy Council made the position clear on the points in *Mst. Maina Bibi v. Vakil Ahmed* when they observed. "The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid, is conferred upon her by the Muhammadan Law. (AIR 1925 P.C. 63; 86 I.C. 241). It is evident that in this case Their Lordship did not make any mention of the consent of the husband or his heirs. On the other hand it was observed that the possession or the right to retain, was not conferred on the widow by the agreement or bounty of her deceased husband. If they had followed the *Hamira Bibi's* case

such consent would have completely changed the complexion of the case but they did not do so. This decision had been followed by the High Court of Bombay. (AIR 1942 Bom. 128). Allahabad High Court held that the consent of the husband or the heirs of the husband is not necessary. [(1910) 32 All. 563 ; 6 I.C. 405 ; AIR 1927 All. 850 ; AIR 1930 All. 881 ; 128 I.C. 760 ; AIR 1933 All. 329 ; 144 I.C. 433]. But it has, in a latter case, held that the consent is necessary. (AIR 1939 All. 348 ; 182 I.C. 801). It is however submitted that the decision in the case was based on *Hamira Bibi's* case and also on *Amanatunnissa v. Bashirannissa*. No reference was made either to *Mst. Maina Bibi v. Vakil Ahmed* or to the earlier decision of the Court. It is, therefore, respectfully submitted that the decision does not lay down correct law, and that the consent of the husband or his heirs is not necessary.

Recovery of dower debt extinguishes right of retention : The right of retention is extinguished on the payment of dower debt. (AIR 1942 Pesh. 92). This can happen in two ways. She can satisfy her claim for dower out of the rents and profits of the property which she is retaining (AIR 1940 All. 521 ; 192 I.C. 600), or on payment by the heirs of the deceased of the dower proportionate to their shares, for the recovery of their respective shares. [(1916) 43 I.A. 294 ; 36 I.C. 87].

Whether right of retention is heritable and transferable : There is a conflict of opinion whether the widow's right to hold possession is transferable and heritable. One view is that the right is a personal right, and it cannot therefore be transferred by sale, gift or otherwise. (Muzaffar Ali v. Parbati (1907) 29 All. 640 ; see Mohammad Zobair v. Mt. Bibi Shahidan (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210), nor can it pass to her heirs on her death (Hadi Ali v. Akbar Ali (1998) 20 All. 262). The other view is that the right to hold possession is property. It has thus, been held in some cases that it is also transferable [(Azizullah v. Ahmad (1885) 7 All. 353 ; Majidmian v. Bibi saheb (1916) 40 Bom. 34, 30 I.C. 870 ; Janbi Bibi v. Abbas Ali (1941) N.L.J. 181, 195 I.C. 706, ('41) A.N. 167 ; Abdul Wahab v. Mushtaq Ahmad (1944) All. 68, 211 I.C. 475, ('44) A.A. 68)]. In other cases it has been held that it is both transferable and heritable. [Ali Bakhsh v. Allahdad (1910) 32 All. 551, 561, 6 I.C. 376 ; Amir Hasan v. Mohammad (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345 ; Abdullah v. Shams-ul-Haq (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A.A. 262 ; Beeju Bee v. Syed Moorthija (1920) 43 Mad. 214, 237, 53 I.C. 935 ; Majidmiyan v. Bibi Saheb (1916) 40 Bom. 34, 47-49, 30 I.C. 870 ; Mussammat Bibi v. Mussammat Bibi (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33 ; Mussammat Soqia v. Mussammat Kitaban (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224 ; Sheikh Abdur Rahman v. Sheikh Wali (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72 ; Ramija

Bibi v. Sharifa Bibi (1943) 1 M.L.J. 332, 209 I.C. 104, ('43) A.M. 561 ; *Hussain v. Rahim Khan* ('54) A. Mys. 24)]. If it is transferable, can it be transferred without transferring also the dower debt ? Here again there is a difference of opinion. In some cases it has been held that the right to hold possession cannot be severed from the dower debt and transferred as a separate interest. [(*Ali Baksh v. Allahdad* (1910) 32 All. 551, 557, 6 I.C. 376 ; *Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.C. 833, (32) A.A. 345 ; *Sheikh Abdur Rahman v. Sheikh Wali* (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72 ; *Nosh Ali v. Shamsunnissa Bibi* (1939) All. 322 (1939) A.L.J. 138 ; *Mohitan v. Zuberah* ('54) A. Pat. 17). In other cases it has been held that it can be so transferred. [(*Abdullah v. Shams-ul-Huq* (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A.A. 262 ; *Mussammam Bibi v. Mussammam Bibi* (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33 ; *Massammam Sogia v. Mussammam Kitabam* (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224,)]. But a transferr merely of the dower debt does not pass to the transferee the right to hold possession of property. (*Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345)]. In *Maina Bibi v. Chaudhri Vakil*, (1925) 52 I.A. 145, 159, 47 All. 250, 262, 86 I.C. 579, ('25) A.P.C. 63), the Privy Council expressed a doubt whether a widow could transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Thought it cannot be said with certainty whether it is also transferable. The High Courts of Bombay and Mysore are in favour of the view that it is also transferable [(*Cooverbhai v. Hayathi* (1943) 45 Bom. L.R. 730 ; *Hussain v. Rahim Khan* ('54) A. Mys. 24)], but the Patna High Court has held that it is not transferable [(*Zobair Ahmad v. Jainandan Parsad* ('60) A.P. 147). Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her, which fails to effect a transfer of the ownership with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession (*Maina Bibi v. Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.P.C. 63 ; *Musammam Sitaram v. Ganesh* (1927) 2 Luck. 553, 101 I.C. 714, ('28) A.O. 209 ; see *Mohammad Zobair v. Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210 ; *Aminuddin v. Ramkhelawan* (1949) 27 Pat. 218, ('49) A.P. 427)].

Proof of payment : The onus of the payment, discharge, on satisfaction of the dower is always on the person alleging such payment discharge or satisfaction. The fact of the payment is within the knowledge of the person making it, and therefore, he must prove it by positive evidence. (PLD 1959 (W.P.) Lah. 710).

Limitation for filing suit : The limitation in the case of prompt dower is three years. It begins to run from the date when the dower is demanded

and refused. Where no demand has been made during the continuation of marriage the limitation begins to run from the date of the dissolution of marriage by death or divorce. This is by virtue of Limitation Act, 1908 Sch. 1, Art. 103), otherwise there is no such limitation prescribed under Islamic Law.

The period of limitation for a suit for deferred dower is three years. It begins to run from the date on which marriage is dissolved by death or divorce. (Limitation Act, Sch. 1, Art. 104). It is submitted that where deferred dower is payable at a particular time during the continuation of marriage, limitation would begin to run from the time when it is demanded after the expiry of the period when it becomes due, or when it is not demanded during the continuation of the marriage from the date of the dissolution of marriage by death or divorce.

When the widow is in possession of husband's property she, may sue the other heirs of her husband for the payment of her dower at any time and limitation does not begin to run against her so long as she is lawfully in possession of the property in lieu of dower. (38 All. 568 ; 10 I.C. 282).

Dispute about dower : When there is no written contract and a dispute arises between the married parties at any time during their marriage regarding the amount of dower, the *mahr al-mithl* of the woman must be taken as the standard by which the respective allegations of the husband and the wife are to be tested. For example, if the wife were to allege that the sum of Rs. 5000 was settled as her dower and the husband were to say that Rs. 2500 only was so fixed, it must be ascertained what the woman's customary dower would be. If it be not less than Rs. 5000, the probability is that the allegation of the wife is correct. The same principle would be adopted, in case the dispute arose subsequently to the death of one or both of the parties ; that is, where it is impossible to ascertain what the exact dower is, the wife or her heirs, as the case may be, should be held entitled to the customary dower, *mahr al-mithl*.

This, however, refers to cases where no evidence is obtainable on either side as to the amount of dower settled at the time of marriage. When a woman can establish presumptive grounds for coming to a different conclusion, and for holding that she is entitled to more than her *mahr al-mithl*, she is not debarred from doing so.

The Court of Algiers enforced this principle in a case reported by M. Sautayra. A person died leaving three widows, two of whom established conclusively their right to dower. The third could offer no proof, but there was nothing to indicate that the amount of her dower was less than those of the first two wives. The Court held with the Qadi, who decided the case in the first instance, that she was entitled to the same dower as the others,

The property of husband and wife : The property of the married parties is always distinct. Originally, and at the commencement of the married life, it is easy to distinguish which part of it belongs exclusively to the wife and which to the husband. Later, and after the husband and wife have lived together in one conjugal domicile, it becomes difficult to distinguish the property of the one from the property of the other. Should a dispute then arise between the parties, or after their decease, between their respective heirs, regarding the household effects of the common domicile, then, in the absence of any direct proof, the presumption of law is that the "things which by custom appertain to women" will be considered as the wife's property, and those "which appertain to men" will be the husband's. The right to what is appropriate to both will be decided with reference to local usage or custom. In case of separation between husband and wife, every *paraphernal* article belongs to the woman.

CHAPTER—VIII

Valid Retirement (Khilwat al-Sahihah)

Section 77. Valid retirement means getting together of the husband and wife alone at a place, house or part of a house, where there is no impediment whether corporeal, natural or legal in having sexual intercourse.

Explanation : The place, house, or the room should be such where no one else might have an access without their permission.

COMMENTARY

The literal meaning of the word, *khilwat* is “seclusion”. In law, it means “the getting together of the husband and the wife in seclusion.”

Valid retirement means that the husband and the wife both should get together in seclusion at such a place where no one may have an approach, without their permission, or on account of darkness or for some other reason, one may have no knowledge of their being there. In other words, when the husband and wife are together by themselves in a place where, if they so desire, they are secure from observation (by outsiders) and where there is no impediment, whether legal or physical, to prevent their sexual intercourse, they are said to have validly retired.

In *Fatāwā ‘Ālamgīryyah* valid retirement has been defined as follows:—

“When a husband and a wife are alone together under such circumstances that there is no legal, moral, religious, or physical impediment to marital intercourse, they are said to be in *khilwat al-Ṣaḥīḥah* i.e. valid retirement.¹

Impediment to valid retirement :

Impediments to a valid retirement are of three kinds :—

1. Corporeal impediments.
2. Natural impediments.
3. Legal impediments.

¹*Fatāwā ‘Ālamgīryyah*, Dewband, vol. ii, p. 20 :

”الخلوة الصحيحة ان يجتمعافى مكان ليس هناك مانع يمنعه من الوطنى حساً او شرعاً او طبعاً“

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Corporeal Impediment :

By corporeal impediment it is meant that the husband or the wife be suffering from such a disease that it may prove an impediment in having sexual intercourse or on account of which there may be a risk of injury.

Natural Impediment :

Natural impediment means and includes that the woman is in her menses or *nifās* (bleeding after child-birth).

Legal Impediment :

By legal impediment it is meant that the husband or the wife be either observing fasting or be engaged in compulsory prayers.²

If the husband be "*Mājībūb*" (whose male organ is cut) or impotent or castrated (deprived of the testicles) it will be no impediment to the valid retirement,³ until it is proved that the man was totally incapable of cohabitation. As it has been experienced that even *Mājībūb* and the impotent, in certain circumstances, inspite of their defects, have succeeded in giving satisfaction to the sexual desire of women, the jurists have placed retirement with the impotent and *Mājībūb* in the category of valid retirement in the expectation that the defect may be removed.

Ibn al-Nujaym, the author of the *Baḥr al-Rā'iq* has stated that "there are four conditions necessary to make a retirement tantamount to actual cohabitation, viz. (i) that the retirement must be real ; (ii) that there must not be any physical ; (iii) moral ; (iv) or legal impediment."⁴

Real retirement means that there should be no third person at the place and that the place itself should not be a public one, like a public bath, public road, a mosque, etc. The place must also be fitting for retirement. It must not be exposed to public view or open to public access. An open or unclosed room will not give rise to the presumption of valid retirement.

Moral and legal impediments include a woman being in her menses or in her *nifās* (bleeding after child-birth) or the parties being on a *ḥajj* or subject to the rules of *iḥrām*. If the husband does not know that the woman is his wife, it amounts to legal impediment.

²Dāmād Āffandī : *Majma' al-Anhur*, Egypt, vol. i, p. 349. Ibn al-Ābidīn : *Radd al-Muhtār*, Egypt, vol. ii, p. 465.

³Fatāwā Qādī Khān, Delhi, vol. i, p. 181. 'Ubaydullah b. Mas'ūd : *Sharḥ Wiqāyah*, Muṭtabā'ī Press, Delhi, p. 38. *Fatāwā Ālamgīriyyah*, Dewband, vol. ii, p. 20 :

خلوة المجهوب خلوة صحيحة عند أبي حنيفة وخلوة العنين والخصي خلوة صحيحة
كذافي الذخيرة

Al-Sarakhsī : *Al-Mabsūt*, Egypt, vol. v, p. 101-3.

⁴Ibn al-Ābidīn : op. cit. vol. ii, p. 465.

Physical impediment includes the malformation of the woman's organ which prevents intercourse. It also includes infancy on the part of either or both which prevents sexual intercourse.⁵

It is, however, stated in *Fatāwā 'Ālamgīryyah* that "the fact that the husband is impotent and is not capable of consummating marriage does not detract from the effect of valid retirement.⁶ For example, a woman is married to a man. They are both in a private room for some time. It is admitted that the man is a born impotent and is incapable of consummating marriage and as a matter of fact did not consummate it. Nevertheless it is a valid retirement.

Syed Amīr 'Alī in his book "Muhammadan Law" also writes : "Where these impediments are not present, retirement is tantamount to actual copulation for certain purposes, even though the husband may be impotent.⁷

Section 78. (a) Valid retirement as regards its effects shall be construed to be the substitute of cohabitation for the following purposes :—

Effects of valid retirement

- (1) Making the entire dower incumbent on the husband.
- (2) Establishing paternity to the issues.
- (3) Making the term of probation on the wife incumbent.
- (4) Making the maintenance of wife, during her term of probation, incumbent on the husband.

(b) Valid retirement as regards its effects shall not be deemed to be the substitute of cohabitation in the following incidents :—

- (1) Loss of maidenhood.
- (2) Sentencing to stoning to death.
- (3) Prohibition in marriage of the daughter of the wife from her former husband.
- (4) Revocation of divorce.
- (5) Inheritance.

⁵*Fatāwā al-Ālamgīryyah*, vol. ii, p. 20.

⁶*Ibid.*

⁷Syed Amīr 'Alī : *Muhammadan Law*, Lahore, 6th ed., vol. ii, p. 290.

COMMENTARY

The retirement into *nuptial* chamber marks the time when the conjugal rights commence. After such retirement payment of full dower becomes obligatory. "Our masters", it is stated in the *Fatāwā 'Ālamgīriyyah*, "have placed the *k̲hilwat al-Ṣaḥīḥah* in the same category as actual cohabitation in respect of certain of its consequences, but not others. They have done so in the matter of confirmation of dower, the establishment of paternity, the observance of probation ('*iddat*'), the (wife's) right to maintenance and lodgment, and the unlawfulness of marriage with her sister or with four other women besides her.⁸

Hanafi & Shi'ah Law—Difference :

The difference between Ḥanafī and Shī'ah law on this point has also been stated in a judgement of Judicial Commissioner of Oudh in *Bismillah Begum versus Shabi Bano Begum* that "in Sunni Law", valid retirement affects the rights of the parties in the same way as actual cohabitation in the following five particulars, even though it be proved or admitted that there had been no actual consummation :—

- (1) the confirmation of dower,
- (2) the establishment of paternity,
- (3) the observance of probation ('*iddat*'),
- (4) the wife's right to maintenance and residence during '*iddat*', and
- (5) prohibition by unlawful conjunction.⁹

The above rule of the *Ḥanafīs* (and *Malikīs*) is based on the following traditions of the Holy Prophet and his reverend Companions :—

- (1) The Prophet is reported to have said "The person (husband) who removes the veil of a woman (wife) and looks at her, the whole of the dower becomes incumbent upon him, whether penetration takes place or not."¹⁰
- (2) It is narrated by Sa'īd Bin al-Musayyib that Caliph 'Umar ordered that "a man after marrying a woman, when uncovers her veil, the whole of dower shall of certain become incumbent on him."¹¹

⁸*Fatāwā 'Ālamgīriyyah*, op. cit. p. 21 :

” واصحابنا اقاموا الخواة الصحيحة مقام الوطى فى حق بعض الاحكام ودون البعض فاقاموها مقامه فى حق تاكد المهر وثبوت النسب والعدة وانفقة والسكنى فى هذه العدة وحرمة نكاح اختها واربع سواها “

⁹18 O.L.J. 179.

¹⁰*Al-kāsānī : Badai' al-Ṣanā'i'*, Egypt, vol. ii, p. 291.

¹¹*Imām Malik : Muwaṭṭa*, (Sharḥ by zarqānī), Cairo, vol. iv, p. 17.

- (3) Za'yd Bin Thabit (Companion of the Holy Prophet) said "if a man (husband) goes to a woman (wife) and the veil is lifted, certainly the whole of dower shall become incumbent upon him."¹²

Shi'ah Law :

In *Shi'ah* law, on the other hand, mere valid retirement as such is of no consequence as regards the rights of the parties. Cohabitation must be proved either by circumstantial evidence of valid retirement or otherwise, to give rise to legal effects.¹³ According to *Shi'ah fiqh* the dower of a woman becomes incumbent on cohabitation. Mere retirement does not make it incumbent on the husband. According to one weak tradition it has, however, been said that it becomes incumbent on retirement too. The first assertion that the dower becomes incumbent on cohabitation, being more authoritative, has been acted upon all along. Accordingly, Najm al-Dīn Abī Ja'far Al-Ḥillī, one of the most renowned Shi'ah jurists, in his noted book, *Sharai' al-Islām*,¹⁴ has stated that dower does not become incumbent by retirement.

Another renowned Shi'ah jurist, Abū Ja'far Muḥammad b. Al-Ḥasan al-Ṭūsī (d. 460 A.H.) in his book "Al-Istibṣār, a collection of Shī'ī traditions chosen carefully, in chapter XIV of Vol. III, deals with matters that make the full dower incumbent. Al-Ṭūsī, in support of the above Shi'ah view, has quoted a number of traditions through Imām Jafar Sadiq :¹⁵

It has been reported by Yūnus b. Ya'qūb from Abū 'Abdullāh (i.e. Imām Ja'far Ṣādiq) that he heard him saying "The dower does not become incumbent except on cohabitation."¹⁶

Muḥammad b. Muslim reported that he asked Abū Ja'far as to when dower becomes incumbent ? Abū Ja'far said "when one has sexual intercourse with the wife."¹⁷

Abū 'Abdullah was asked as to when the dower becomes due on a man who had sexual intercourse with his wife. He said "when the organs of the man and the woman (husband and wife) both become joined, the dower and the period of probation 'iddat become incumbent."¹⁸

¹²Al-Shaybāni : *Muwatta*, Karachi, p. 239.

¹³18 O.L.J. 179.

¹⁴Vol. ii, (Kitab al-Nikāḥ) Beirut, p. 35.

والدخول الموجب للوط ، هو الوط قبلا او دبراً ولا يجب بالخلوة وقيل يجب والاول اظهر

¹⁵Al-Tusi : *Al-Istibṣār*, vol. iii, p. 226.

¹⁶Ibid, Tradition No. 817.

¹⁷Ibid, Tradition No. 818.

¹⁸Ibid, Tradition No. 819.

It is reported by Muḥammad b. Muslim from Abū ‘Abdullāh that he asked him about a man and a woman as to when bathing becomes imperative on them? He replied, when the man has cohabited, the bath, dower and (in case of unlawful cohabitation) stoning to death (رجم) become incumbent.¹⁹

Regarding the payment of dower in a case where a *Shī‘ah* husband divorced his wife without cohabiting with her, it is an established rule of *Shī‘ah fiqh* that a *Shī‘ah* wife is entitled to half the dower in case of her being divorced before cohabitation. In other words, if a husband without demand of his wife divorced her, before cohabitating, he shall have to pay half of the settled dower to such divorced wife. This is clear from the statement of the *Sharai‘ al-Islām*.²⁰

Shaykh al-Ṭūsī has also stated a tradition from Abū ‘Abdullah in his above noted book which is as follows :

I inquired from Abu ‘Abdullah about a man who had married a woman who was brought to him (on *rukhsatī*). The man closed the door, lowered down curtains and touched and kissed the woman but did not cohabit with her. He thereafter divorced her. Abū ‘Abdullah replied “That man shall be liable to pay half of the dower.”²¹

In the case of dissolution of marriage on account of the husband’s impotency it is stated in *Sharā‘i‘ al-Islām*, “If the man could cohabit with that woman (wife) or with any other woman, the wife shall have no right to get the marriage dissolved. If the man could not cohabit, the wife shall get a decree for the dissolution of marriage and shall be held entitled to half of her dower.”²²

Conclusion :

In view of the above *Shī‘ah* traditions and statements of the jurists, one can easily reach the conclusion that in the *Shī‘ah* law mere marriage or retirement is not the basis for payment of dower. It is rather cohabitation. If, therefore, there is no cohabitation after marriage and the wife, leaving the husband, goes back to her parents’ house and refuses to come back to

¹⁹Ibid, Tradition No. 820.

²⁰Al-Hillī : op. cit. Beirut p. 16.

إذا طلق قبل الدخول كان عليه نصف المهر

²¹Al-Ṭūsī - op. cit. Tradition No. 828.

²²Al-Hillī : op. cit. Beirut p. 31, 32 :

” كذا لو فسخت قبل الدخول فلا مهر إلا في العنين فإن واقع أو واقع غيرها فلا خيار ،
والأكان لها الفسخ ونصف المهر “

²³Al-Qur’ān, Sūrah Al-Baqarah, (The Cow), ii : 237.

the husband and demands the fixed dower and also files a suit for dissolution of marriage, for no defect in the husband, she shall not be entitled to any dower except in case of impotency. If she claims separation on the ground of impotency of the husband, she should be held entitled to half of her dower. This is according to Shi'ah law. Sunni law on this point is different.

The Qur'anic verse, "And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them)" can also be held to be relevant to the issue. The word "mas" in the above verse means literally "touching". According to *Hanafīs* and *Mālikīs* it means retirement (خلوة)²⁴ while according to Imām Shafi'ī and Shi'ahs it means cohabitation (دخول)²⁵. The meaning of "mas" as understood by the *Hanāfis*, to my mind, appears to be more correct, and appropriate. It is also based on sound reasoning. If the *rukhsatī* takes place and the wife is taken to the nuptial-bed and valid retirement takes place but the husband who unveils and kisses her or lies down on bed with her, does not cohabit, because of his own impotency or otherwise, the woman, of certain, gets the right to recover her full dower.

The question of the payment of full or half dower, however, becomes important, only when the wife is divorced by the husband, before valid retirement. In case of prompt dower, it is the right of the wife to claim and recover her full amount of dower even before surrendering herself to the husband. She is, however, entitled to half dower, if divorced before valid retirement. The impotency of the husband does not exonerate him from the consequences of valid retirement. The non-capability of one to use the thing contracted for and taken possession of does not extinguish its consideration. As is the case in 'ijārāh, hire, the use that of the "corpus" therein is no condition precedent to incidence of consideration.

Section 79. Irregular retirement means getting together of the husband and the wife at such a lonely place, house or part of a house where there is no apprehension of some one getting in or seeing them without their permission but both or either of them have no capacity for really having sexual intercourse.

Irregular
retirement

COMMENTARY

By reading Section 77 and 79 together it is evident that the impediment of incapacity of a husband to cohabit with his wife, as a general rule, makes the *Khilwat* as *fāsid* i.e. irregular. In effect, however, impotency stands on a different footing. Imām Sarakhsī has stated about an impotent

²⁴Al-Kāsānī : op. cit. vol. ii, p. 291.

that sometime the defect is natural and permanent and sometime it is causative and temporary. In order to know about the exact nature of the defect the possible way would be to fix one year's time for his treatment, so that during this period after getting necessary treatment he may accomplish the purpose of marriage contract. If during this period of one year, the purpose could not be achieved, it will be a sign that his impotency was natural and permanent and his wife shall then be entitled to get the marriage dissolved on this ground. Imām Sarakhsī, after quoting an averment of Imāms Abu Yusuf and Muḥammad, has also stated that according to these two Imāms the husband shall be bound to pay, on the dissolution of marriage, the entire dower to his wife. The wife has not failed to surrender herself to her husband, why should, then, her right to dower be curtailed ?²⁶

Section 80. In case of an irregular retirement, on the dissolution of marriage, the term of probation ('iddat) and maintenance during that period shall be incumbent on the husband.

COMMENTARY

Although *Qiyās* demands that on dissolution of marriage by divorce, *khula*, *mubarāt* or death of the husband, in case of irregular retirement, no term of probation on the wife or her maintenance during the said term be made incumbent on the husband, but the jurists, on the basis of the rule of *istihsān*, have said that the same shall be incumbent. This as a rule of expediency should be adhered to.

²⁵Ibid, p. 292.

²⁶Al-Sakhsī : Al-Mabsūt, op. cit. vol. v, p. 101-103,

CHAPTER—IX

Wife's Maintenance Allowance (Nafqah)

Section 81. Maintenance allowance is the consideration for the control which the husband exercises over the movements of the wife. It includes proper food, clothing and accommodation.

COMMENTARY

The word maintenance allowance in English stands for *nafqah*. *Nafqah*, literally means *ikhrāj* i.e. taking out. In its dictionary meaning *nafqah* is that which one spends on his children etc. This word is itself a noun in etymology. It is not a derivative of *Al-Nufuq* or *Nafaq*.¹ In legal terminology *Nafqah* refers to provision for necessities of life to wife in consideration of her reserving herself for the husband. In general terminology to make provision for one's necessities of life by another in consideration of his labour is called *Nafqah*.⁹

The *Sharī'ah* has given a right to the husband to retain a hold on his wife in return whereof it is obligatory on him to provide maintenance to her. This right and corresponding obligation arise out of the following verses of the Holy Qur'ān :

- (i) "Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allāh has given him."³
- (ii) "Let the women live (in *iddat*) in the same style as ye live, according to your means."⁴
- (iii) "But he shall bear the cost of their food and clothing on equitable terms."⁵

¹Ibn Nujaym: *Al-Bahr al-Rā'iq*, Cairo, vol. iv, p. 188.

²Al-Jazarī, Abdur Raḥmān : *Kitāb al-Fiqh'alal Madhahib al-Arba'ah*, Cairo, vol. iv, p. 553.

Ibn al-Humām : *Sharh Fath al-Qadīr*, Cairo, vol. iii, p. 321.

³Al-Qur'ān, surah Al-Talaq (The Divorce), LXV : 7,

” لينفق ذو سعة من سعته ومن قدر عليه رزقه فلينفق مما آتاه الله ”

⁴Ibid, LXV. 6,

” اسكنوهن من حيث سكنتم من وجدكم ”

⁵Al-Qur'ān, surah Al-Baqarah (The Cow), II : 233,

” وعلى المولود له رزقهن وكسوتهن بالمعروف ”

Ibn al-Humam : op. cit, vol. iii, p. 321 ; Ibn Nujaym : vol. iv, op. cit. p. 188.

What includes Nafqah :

Nafqah generally includes food, clothes and dwelling. There are other necessary articles as well, which are included in *nafqah* e.g. soap, oil, water, medicine and similar other articles and things which are necessary for the livelihood and comfort of a woman.⁶

Under the *Shari'ah* it is the duty of the husband to provide cooked food and stitched clothes to his wife.⁷ A wife cannot be compelled to cook food for herself, much less for the husband ; nor she is to be compelled to stitch her clothes. The husband is bound to provide her a separate house or a separate portion of a house which has an independent entrance and exit,⁸ although she can, by her free will, live with the parents or other relations of the husband.⁹

Maintenance—a Sadaqah :

If husband spends some money for the benefit of his wife to please Almighty God he does a right thing and the money so spent will be a Sadaqah. (Tajrid-al-Bukhārī, page 30).

Maintenance and Annuity—Difference of :

The difference between an annuity and a maintenance allowance is that the latter is referable to a duty to maintain, with a corresponding right to be maintained while the former is not. (AIR 1936 Pat. 527).

Section 82. The wife's maintenance becomes obligatory on the husband because of her surrendering herself to him.

Basis of *Nafqah*
(maintenance
allowance)

COMMENTARY

The maintenance allowance is incumbent on the husband due to his wife's surrender of her person to him. There are three grounds which make it obligatory on one to provide maintenance for the dependents :

- (i) Marriage,
- (ii) Consanguinity,
- (iii) Ownership.

⁶*Fatāwā al-Ālamgīriyyah*, Kanpur, vol. ii, p. 144 ; *Sharh Wiqaya*, 'Ubaydullah b. Mas'ūd : Muṣṭabā'ī Press, Delhi, vol. ii, p. 171 ; Al-Jazarī : op. cit. vol. iv, p. 553.

⁷Ibn Nujaym : op. cit. vol. iv, p. 200. *Fatāwā Qōḍī khān*, Delhi, vol. i, p. 196-98.

⁸*Fatāwā 'Ālamgīriyyah*, op. cit. vol. ii, p. 147.

⁹Ibid ; 'Ubaydullah b. Mas'ūd ; op. cit. vol. ii, p. 171 ; *Fatāwā Qōḍī khān* : op. cit. p. 196,

The husband's liability to maintain his wife is created by marriage. The other ground is of consanguinity which makes it obligatory upon the parents to maintain their children or places upon the children liability to maintain their aged and destitute parents. The third reason of the incidence of maintenance is ownership e.g. the obligatory maintenance of a slave.¹⁰

Basis of husband's liability :

The basis of the husband's liability to maintain his wife is not merely marriage but it arises out of the wife's surrender of her person to her husband.¹¹ In other words, when the wife puts herself under the control of the husband, her maintenance becomes obligatory on him. But there is an exception to this general rule : If the husband, due to his own shortcomings, is unable to keep his wife with him, e.g. he is incapable of having sexual intercourse with her, or does not wish to keep the wife with him for his own reason, the wife's right of maintenance will not be affected.

It is obligatory on the husband to maintain his wife and behave with her on equitable terms and that he should take proper care of her comfort.¹² If a husband has more than one wife he should, apart from other matters, provide maintenance evenly and should treat them equitably.¹³ He should not in maintenance discriminate among those who had been virgins or widowed or divorced by a previous husband, young or old, Muslim or *Kittābiyah*. He should not prefer one wife over the other in the matter of maintenance, even if any one of them be more healthy or sicklier or in her menstrual periods or otherwise.

Section 83. It is obligatory on the husband to maintain his wife in the following cases :

Conditions of
obligation to
maintain

- (i) When the marriage is valid ;
- (ii) When wife has placed herself under the control of her husband ;

¹⁰Al-Jazārī ; op. cit. vol. iv, p. 553 ; Ibn Nujaym : op. cit. vol. iv, p. 188 ; Ibn al-Ābidin : *Radd al-Muhtār*, vol. ii, Chapter on *Nafqah*, p. 676.

¹¹*Fatāwā Qāḍī Khān* : op. cit. vol. i, p. 195. Ibn Nujaym : op. cit. vol. iv, p. 194.

¹²*Ahkām al-Shar'īyyah fil Ahwāl Al-Shakbsiyah*, Cairo, Sec. 150.

¹³*Ibid.* Sec. 153-54 ; *Fatāwā Qāḍī Khān* : op. cit. p. 195.

- (iii) When the wife is physically mature for consummation, irrespective of the husband being a minor or not capable of having intercourse with her ;
- (iv) When the wife is residing at the house of her parents and the husband has not asked her to come to his house, or refuses to keep her at his house, without sufficient cause ;
- (v) When the wife refuses to go to the house of her husband and/or reside with him on account of the non-payment of her prompt dower or for any other sufficient cause whether the marriage has been consummated or not.

COMMENTARY

Valid Marriage :

One of the reasons for the incidence of the woman's maintenance on man is marriage, but the marriage must be valid.¹⁴ In case of irregular marriage, the woman shall not be entitled to maintenance, except in a marriage irregular for want of witnesses at the time of *nikah*.¹⁵

Sexual Intercourse :

Basically the age of a woman will not be the criterion for purposes of man's obligation to maintain her, but it will be looked into whether she can bear the strain of consummation. If she can, her maintenance will be incumbent on the husband even though the husband be minor or incapable of cohabiting with her.¹⁶

Surrender to control :

To put herself under the control of the man means that the wife has surrendered herself to her husband.¹⁷ If the wife for valid reasons resides at the house of her parents the wife's right of maintenance shall not be affected.¹⁸

¹⁴Al-Jazari : op. cit. vol. iv, p. 565. Ahkam al-Shar'iyya fil Ahwal Al-Shakhsiya : Egypt, Sec. 162.

¹⁵Ibid ; Ibn Nujaym : op. cit. vol. iv, p. 194 ; *Fatāwā Qāḍī Khān*, op. cit. vol. i, p. 195 ; *Fatāwā 'Ālamgīriyyah*, op. cit. vol. ii, p. 143.

¹⁶Al-Qudūrī : Al-Mukhtaṣar, Karachi, p. 173.

¹⁷Ibid ; Ibn Nujaym : op. cit. vol. iv, p. 194.

¹⁸Ibid.

Non-payment of dower :

If the dower is prompt or it is payable within a certain period and that period has expired, and the dower remains still unpaid, and for that reason the wife refuses to live with her husband, her refusal will be considered to be valid, and her right to maintenance shall not be affected, whether marriage has been consummated or not.¹⁹ Her right to maintenance shall also not be affected if the wife refuses to return to the house of her husband or live with him for some valid reason e.g. his cruelty.

Husband's liability :

A husband is bound to maintain his wife. (AIR 1946 Sind 48 : AIR 1941 Lah. 167 ; AIR 1949 Sind 48 ; AIR 1945 Pesh. 51 ; AIR 1943 Lah. 310 ; AIR 1943 Pesh. 73 ; AIR 1946 Pat. 467 ; AIR 1941 Sind 23 ; AIR 1942 Lah. 92 and AIR 1950 Sind 8).

Maintenance of a minor wife :

In the case of Muhammadans, where a wife although legally married has not attained the age of puberty there is no liability on the part of the husband to support her as long as she remains under the roof of her father. (24 WR Cr. 44).

Section 84. The husband will not be liable to maintain his wife in the following cases :

Maintenance
not obligatory

- (i) When the wife is unable to bear the strain of sexual inter-course for being under-age, but in case of insanity or old age, even if she is not capable of sexual inter-course, the right of maintenance shall not be affected.
- (ii) When she is so sick that after the marriage she is unable to come to the house of her husband.
- (iii) When the wife goes out for *Haj* without the permission of her husband except when the *Haj* is obligatory on her.
- (iv) When the wife is in employment of somebody or is an artisan and in spite of husband's objection remains outside the house.

¹⁹Ibid.

(v) When the wife is in prison, but in case of her husband's imprisonment she shall not be deprived of her maintenance.

(vi) When the wife is disobedient and without the leave of her husband, for no valid cause, leaves the house of her husband, or if the house belongs to her, she denies the husband entry and to live with her.

Explanation : If the wife lives in the house of her husband she will not, for the purpose of maintenance, be deemed disobedient, although she refuses the husband to cohabit with her.

(vii) When the marriage is irregular (*fāsid*), as well as in case of cohabitation taking place in doubt, after the defect in marriage becomes known to the parties, except where the irregularity is caused for want of witnesses at the time of *nikāh*.

(viii) When the wife without any valid reason resides separate from her husband or refuses to accompany him to another city, except when the prompt dower in spite of demand has remained unpaid, or according to some valid agreement between the parties relating to maintenance allowance.

(ix) When the wife becomes apostate.

(x) When judicial separation has taken place owing to some sinful act committed by the wife.

(xi) When the wife observes 'iddat for death of her husband.

Exception : If the widow is pregnant from her husband at the time of his death, her maintenance shall be incumbent till the child is delivered.

(xii) When someone entices away the wife.

COMMENTARY

Minority of wife : The basis of wife's maintenance is exercise of exclusive control by her husband over her. If the wife is a major, her maintenance shall be due upon her husband. It does not matter if the husband is capable of cohabiting with her or not. If, however, cohabitation with the wife be not possible because of her minority, the husband shall not be liable to maintain the wife²⁰. But in case of insanity or old age, even if she is not capable of sexual intercourse, her right of maintenance shall not be affected.²¹

Sickness : The maintenance of a sick wife is not incumbent on the husband if she is so sick that after the marriage ceremony she cannot come to the house of her husband. This applies only when consummation has not taken place. In case the marriage has been consummated, the liability of the husband to maintain his wife shall subsist irrespective of the fact that the wife is sick and is at the house of her parents or of the husband.²² In other words, if the wife is sick and is at the house of her husband her right of maintenance shall not be affected, and such also is the case if she after

²⁰ *Fatāwā Qāḍī Khān* : op. cit. vol. i :

فان كانت لا تجماع لانفقة لها (p. 194)

فان كانا صغيرين لا يطيقان الجماع لانفقة لها (p. 195)

Ibn al-Humām : op. cit. vol. iii, p. 324 ; Babarti : *Ināyah*, on margin of *Sharh Fath al-Qadīr*, op. cit. vol. iii, p. 324.

²¹ *Sharh Wiqayah*, Muṭtabā'ī Press, Delhi, Chapter on Nafqah, vol. ii, p. 273 ; Ibn al-Humām : op. cit. vol. iii, p. 327.

²² Qadrī Pāshā ; *Al-Ahkām al-Shariyyah fil-Aḥwāl Al-Shakhsiyyah*, Cairo :

”المريضة التي لم تزف الى زوجها ولم يمكنها الانتقال اصلاً لانفقة لها“ (Sec. 167)

”اذا مرضت المرأة مرضاً يمنع من مباشرتها بعد الزفاف والنفقة الى منزل زوجها او قبلها ثم انتقلت اليه وهي مريضة اولم تنقل ولم تمنع نفسها بغير حق فلها النفقة عليه“ (Sec. 164)

Fatāwā Qāḍī Khān : op. cit. vol. i, p. 194-95,

”ولا نفقة للمريضة اذا لم تزف الى بيت زوجها فان زفت قالوا لها النفقة ...

واذا زفت المرأة الى زوجها وهي صحيحة ومرضت في بيت الزوج مرضاً لاتحمل الجماع ان كان بني بها كان لها النفقة ...“

becoming sick and after consummation of marriage has gone to her parent's house and is unable to go back to her husband's house.²³

Haj Pilgrimage : According to *Ḥanafī fiqh*, if the wife goes to the pilgrimage for *Haj* without the leave of her husband, even if the *Haj* be obligatory (*farḍ*) she shall not be entitled to maintenance for that period of absence. According to Imām Muḥammad even if she goes for *Haj* along with her relatives within the prohibited degrees, she shall not be entitled to maintenance. Imām Abū Yūsuf, however, holds that she shall get maintenance, as if she was residing with her husband.²⁴ Contrary to this the Shi'ah view is that if the *Haj* is obligatory (*wajib*) for her and she goes to perform it, even without the leave of the husband, she will not be deprived of her maintenance.²⁵ In view of the present writer, if the *Haj* is obligatory on her its performance should not be refused nor she should be deprived of her right of maintenance by her husband, without reasonable cause warranted by Sharī'ah, as the performance of a *rukṇ* of Islam, in normal circumstances, should get preference over the will of a husband. In this respect, the view of Abū Yūsuf and Shi'ah jurists appears to be more reasonable.

Employment : If the wife in spite of her husband's objection engages herself in some employment or is an artisan and thus keeps herself out, for purposes of earning, her husband shall not be liable for her maintenance because basically the liability of maintenance is based on surrender to or the control of the husband over the wife.²⁶

Imprisonment : When the wife is in prison she loses her right of maintenance. The standard of imprisonment for the purposes of non-liability of the husband for maintenance, however, is that the husband should have no

²³Ibid :

”ولو مرضت المرأة في بيت زوجها بعد الدخول فانتقلت الى دارائنها ... وان كان لا يمكن نقلها فلها النفقة“

²⁴Qadri Pāshā : *Al-Aḥkām al-Sharīyyah fil Aḥwāl Al-Shakhsiyyah*, Cairo, Sec. 168 :

”لزوجة التي تسافر الى الحج ولولاداء فريضة بدون ان يكون معها زوجها لانفقة لها عليه مدة غيابها وان سافرت مع محرم لها“

Ibn Nujaym : op. cit. vol. iv, 197 ; Ibn Humam : op. cit. vol. iii, p. 326 ; Fatāwā Qādī Khān : op. cit. vol. i, p. 196.

²⁵Amīr 'Alī : *Jamī' al-Aḥkām fi fiqh al-Islām*, Lucknow, 1883 vol. i, p. 215.

²⁶Qadri Pāshā : *Al-Aḥkām al-Sharīyyah fil Aḥwāl Al-Shakhsiyyah*, Cairo, Sec. 169 ; Al-Quduri : op. cit. p. 176 ; Ibn Nujaym : op. cit. vol. iv, p. 190-196.

access to his wife. But because of the imprisonment of the husband the wife's right of maintenance shall not be affected.²⁷

Disobedience (Nushuz) : When the wife is disobedient (*nōshizah*), and without the leave of her husband for no sufficient cause leaves the house of her husband, she disentitles herself to maintenance.²⁸ Similar is the case if the house belongs to the wife but she denies the husband entry to the house and to live with her. If however, she lives in the house of her husband she will not, for the purpose of maintenance, be deemed disobedient (*nāshizah*), although she refuses to cohabit with her husband.²⁹

Irregular (Fāsīd) Marriage : The husband has been made liable to maintain his wife when the marriage is valid. Thus, in case of an irregular (*fasid*) marriage (except in case of a marriage without witnesses) the obligation to maintenance shall continue till the defect (*fisād*) is not known. After the defect in marriage is known the liability of maintenance shall cease and separation will be incumbent on the parties.³⁰

Consortium : For purpose of the incumbency of the maintenance, living together of the husband and wife, as far as possible, is necessary. Thus, if the wife, for no valid reason, does not live with her husband or refuses to live with him, she shall not be entitled to maintenance from her husband.³¹ If, however, the husband wants to take his wife away from the city and there is an agreement between the spouses under which the husband had undertaken not to take the wife away from that city and the wife refuses to accompany her husband, she will not be deprived of her right of maintenance on account of that refusal. Likewise, if the wife refuses to

²⁷ *Fatāwā Qāḍī Khān* : op. cit. vol. i, p. 196; *Qadri Pashā* : *Al-Aḥkām al-Shar'iyyah fil Aḥwāl Al-Shakhsiyyah*, Cairo, Sec. 170 ; *Al-Qudurī* : op. cit. p. 172 ; *Ibn Nujaym* : op. cit. vol. iv, p. 196.

²⁸ *Fatāwā Qāḍī Khān* : op. cit. vol. i, p. 195 :

” والناشرة لانفقة لها وهي التي خرجت عن منزل الزوج بغير حق “

Qadri Pashā : *Al-Aḥkām al-Shar'iyyah fil Aḥwāl Shakhsiyyah*, Cairo, Sec. 171 ; *Al-Quduri* : op. cit. p. 173 ; *Ibn Al-Ābidīn* : op. cit. vol. ii, p. 664.

²⁹ *Fatāwā Qāḍī Khān* : op. cit. vol. i, p. 195 :

” ولو كانت مقيمة في منزله لم تمكنه من الوطى لاتكون ناشرة “

³⁰ *Qadri Pashā* : op. cit. Sec. 174 :

” المنكوحة نكاحاً فاسداً والموطوءة لبشبهة لانفقه لها الا المنكوحة بلا شهود فاذا فرض الحاكم لاحدهما نفقة قبل ظهور فسادالنكاح و فرق بينهما فلزوج الرجوع عليها بما اخذته منه بامر الحاكم لا بما اخذته بلا امره “

Ibn al-Abidin : op. cit. vol. ii, p. 661.

³¹ *Ibn al-Ābidin*, op. cit. p. 664 ; *Ibn Humām* op. cit. vol. iii, p. 326.

live or go out of that city for the reason that her prompt dower has not been paid her right to get maintenance remains unaffected.³²

Apostasy : A wife's right to maintenances lapses if she be guilty of apostasy. This is so because on ground of apostasy the marriage itself stands dissolved. This rule, therefore, is based on the principle that apostasy of one of the couple militates against the partner's sense of belonging to each other.

Wife's Committing Sin : The right of wife's maintenance shall lapse in case separation has taken place on account of some sinful act committed by her, which affects the very foundation of marital relationship as husband and wife. For example, if the wife commits such act with any relation of the husband, which creates prohibition of affinity, her right of maintenance shall lapse and it will become essential to effect separation between the spouses.³⁴

Nafqah during period of Probation (iddat) : There are two aspects of the liability of maintenance during the period of 'iddat. One is that she be observing 'iddat on her husband's death and the other is that the 'iddat be on account of divorce (*ṭalāq*). There is no incidence of maintenance during the period of probation on account of husband's death.³⁵ In case the wife is pregnant at the decease of the husband, she shall get maintenance till the pregnancy is over. There is, however, some difference of opinion in the matter of the incidence of maintenance during 'iddat of divorce.

If the marriage has been dissolved by *ṭalāq* of any category, according to Ḥanafī school of law, the wife is entitled to maintenance, during the period of her 'iddat. Imam Shāfi'ī does not agree with this view in case the divorce is irrevocable. He in support of his contention relies on the tradition of Fatima, daughter of Qais, of whom it was reported that her husband had pronounced three divorces and the Holy Prophet had not prescribed any maintenance for her (Fatima). According to the version of Ḥanafīs, this tradition was repudiated by 'Umar, the second Caliph, and 'Aisha and some *Tabi'īn*. Ṭahāwī and Dār Quṭnī have narrated another tradition that Caliph 'Umar heard the Prophet saying that there is maintenance and abode for a triple divorced woman.³⁶ In this respect, the Ḥanafī law is preferable, because in case of a revocable divorce the woman continues to remain in the wedlock of the man. The husband, within the

³²See Chapter VII on "Dower," Sec. 77, *supra*.

³³Ibn al-Ābidin : op. cit. vol. ii, p. 664 ; Al-Quduri : op. cit. p. 174 ; Al-Jazari : op. cit. vol. iv, p. 567.

³⁴Ibid.

³⁵Ibid.

³⁶Ibn al-Humām : op. cit. vol. iii, Chapter on "*Nafqah*".

period prescribed can, at any time, have recourse to her. She has not been freed from his bond of marriage completely. The wife's maintenance should thus, be incumbent on him. Likewise, in case of an irrevocable divorce or triple divorce, although the wife comes out then and there of the bond of marriage, yet during the period of probation ('iddat) she cannot marry another man. The wife's right to maintenance should, therefore remain intact during the observance of 'iddat even if the divorce is irrevocable.

Maintenance of a wife enticed away : If any person entices away the wife, the husband's liability to provide maintenance to her ceases,³⁷ because the husband's right to enjoy her company is suspended.

Indo-Pakistan Law :

Whether father-in-law is bound : Father-in-law is not bound to maintain his deceased son's widow. (AIR 1950 Bom. 245). He is not bound in law to maintain her even during lifetime of his son.

Maintenance of mamtu'ah : A Shi'ah wife by Mut'ah Marriage is not entitled to maintenance by Shi'ah Law. (8 Cal. 736).

Wife leaving the house of husband : A wife who leaves her husband for no justifiable reason is not entitled to a decree for future maintenance. (AIR 1930 Sind 11). A woman not living with her husband and who is not obedient to her husband is not entitled to maintenance. A wife who renounces Islam is not entitled to maintenance. Under Muhammadan Law, no wife can claim maintenance unless she is performing her marital duties and residing with her husband. She is not entitled to maintenance when she leaves her husband's house and resides at her parent's house. She will also be disentitled to it when she makes an agreement of desertion on the second marriage of her husband. For, any such agreement would be opposed to Muhammadan Law and also without consideration. (AIR 1935 Lah. 902. See also AIR 1949 Pesh. 7 ; AIR 1931 Lah. 721 ; 225 IC 179 ; AIR 1947 All. 3 ; AIR 1943 Sind 65 ; AIR 1945 Lah. 56 ; AIR 1944 Lah. 333 ; AIR 1944 All. 23 and Pak. LR 1952 Dacca 337). Where a Muhammadan husband makes a *bomafide* offer to maintain his wife and children in his house, but the wife refuses the offer, the wife is not entitled to maintenance but the children living with the wife, who is their legal-guardian, are entitled to maintenance. (AIR 1937 Mad. 809).

Pakistan Law :

Wife leaving husband of her own accord : Wife of her own accord left her husband's house and, therefore, is herself responsible for being not

³⁷Al-Qudūrī : op. cit. p. 173 ; Al-Nasafī ; op. cit. p. 152 ; Ibn al-ʿAbidin : op. cit. p. 666.

maintained by him, and so the question of the husband's neglect to maintain her does not arise at all. (*Umara Khan vs. Sultana* etc. P.L.D. 1954 Peshawar 13, Muhammad Shafi J.).

Wife refusing to go to husband's house without sufficient cause : It was held in the case of *Majida Khatun vs. Paghala Mohd.* that as the wife has refused herself to return to her husband's house without sufficient cause she is not entitled to maintenance. [P.L.D. 1963 Dacca 583 ; 14 DLR 465. (Idris J.)].

Maintenance of wife, nature of obligation of husband stated : The maintenance of a wife is the bounden duty of husband irrespective of his minority, illness or imprisonment or the richness of the wife so much so that the obligation devolves on the father of a minor husband with a right of recovery against him when he is in a position to repay the amount. [PLD 1966 (W.P.) Lah. 703 ; 19 DLR (W.P.) 50].

Wife refusing to live with husband without sufficient cause, husband not bound to maintain her—dissolution of marriage cannot be claimed for non-maintenance : The right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and failure of the husband to provide her with maintenance in those circumstances would not entitle the wife to dissolution of the marriage tie. [PLD 1967 AJ & K 32 ; 19 DLR (W.P.) 104 (DB)].

Wife claiming maintenance and separate residence in pursuance of agreement with husband, husband refusing maintenance and suing for restitution of conjugal rights ; Court may refuse to grant decree of restitution in circumstances of the case : Where an agreement made by the husband with his wife allows her to live away from him in case of disagreement or when he takes a second wife, it can in no way be termed as opposed to public policy either under the Muslim Law or within the meaning of section 23 of the Contract Act. A marriage between a Muslim male and a female is purely in the nature of a civil contract and the wife is entitled to protect herself at the hands of her husband in case of their future differences. Where the agreement is to the effect that the wife is entitled to receive alimony in the house of her parents or anywhere else where she chooses to reside in case the husband takes a second wife, there is nothing in such an agreement which may be considered to offend against the term "public policy" which is very broad and it is not safe to rely upon it in such cases as a ground for legal decision. It was thus held, "It is true that it is the duty of the wife to follow the husband

wherever he desires her to go. But such an obligation of the wife to live with her husband at all times and in all circumstances is not an absolute one. The law recognises circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, etc. or he has directed her to leave his house or even connived at her doing so. On all such occasions the husband cannot require his wife to re-enter the conjugal domicile nor the Court of justice can give him assistance to restore him the hand of his wife. The bad conduct or gross neglect of the husband under the Muslim Law is good defence to a suit brought by him for restitution of conjugal rights. Where the husband has failed to provide any maintenance for the defendant wife and her daughter and she was compelled to go to the Criminal Court to enforce the husband's obligation of maintenance under section 488, Cr. P.C., in such circumstances the husband is guilty of gross failure on his part to perform his obligations imposed on him by the agreement and these circumstances afford a sufficient ground to refuse to the husband any relief in his suit. (PLD 1967 Lah. 1104).

Wife living separately, refusal to come back to husband's house justified on ground of cruelty, etc.—husband is bound to maintain her : In Muslim Law it is the duty of the husband to maintain his wife. She is not entitled to maintenance when she refuses to go to her husband's house without sufficient cause or if she is otherwise disobedient. However, if the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband's house on account of his cruelty, the husband is not absolved of the duty to maintain the wife because separate maintenance can be claimed by the wife when the husband has turned her out or the treatment or misunderstanding between them is such that it is irremediable and her return to the husband's house is likely to give rise to fresh troubles and disputes. [PLD 1971 Lah. 866 ; Law Notes 1971 Lah. 601 (DB)].

Section 85. For determination of the wife's maintenance regard shall be had to the status and position of both the husband and the wife. If, however, there be difference of status between them an average rate of maintenance shall be fixed for the wife.

Amount of
Maintenance

COMMENTARY

According to Hanafi school of law for fixation of *nafqah* (maintenance allowance) the status of the wife is taken into consideration while according to Shafi'i school of law the status and capacity of the husband is the determining factor. It is, however, proper that the condition, status and capacity of both husband and wife be taken into consideration while fixing the

maintenance.³⁸ If the wife is rich and the husband be poor the preferable opinion, according to Ḥanafīs, is that payment of maintenance at an average rate shall be incumbent on him. But according to the Shāfi'īs he shall be liable to pay at the lowest possible rate as per the Qur'ānic verse :

“Let the man of means spend according to his means ; and the man whose resources are restricted, let him spend according to what Allāh has given him. Allāh puts no burden on any person beyond what He has given him.”³⁹

Modern Legislation :

Egypt :

Maintenance : Unless a wife is unfaithful to her husband, her maintenance will be a debt against the husband, and it will not lapse except by payment or release ; this rule is applicable also to a divorced wife observing 'iddat. (Law No. 25 of 1920, Articles 1-2.) The scale of maintenance is to be fixed exclusively with regard to the husband's means. (Law No. 25 of 1920, Article 16).

Jordan :

Maintenance of wife : Art. 56. The scale of wife's maintenance shall be fixed with regard to the position of her husband only. Maintenance shall become payable when its amount has been agreed upon by the parties or fixed by the Qādī.

Art. 64. Where the wife leaves her husband's house without his permission she will lose her right to maintenance for the period concerned. It will, however, be a good defence for her in such a case that her husband has beaten or has otherwise caused injury to her.

Art. 65. (ii) Where the wife who is entitled to maintenance falls ill requiring treatment, the husband shall be liable for the expenses of the treatment which shall be fixed up in accordance with his financial condition.

Iraq :

Maintenance of wife : The Iraqi law deals at length with the wife's right to maintenance. The amount of maintenance is to be fixed in accordance

³⁸ Ubaydullah b. Mas'ūd : *Sharh Wiqayah* (Mujtabai), op. cit. vol. ii, p. 172 ; Ibn al-Humām : op. cit. p. 322 ; Ibn al-'Ābidin : op. cit. p. 663 ; *Fatāwā 'Ālamgiriyyah*, op. cit. p. 144.

³⁹ Al-Qur'ān, surah *Al-Talaq* (The Divorce), LXV : 7,
 “لِيَنْفِقَ ذُو سَعَةٍ مِّن سَعَةٍ ، وَمَن قَدَرِ عَلَيْهِ رِزْقُهُ فَلْيَنْفِقْ مِمَّا آتَاهُ اللَّهُ لَا يَكُفَّ اللَّهُ
 نَفْسًا إِلَّا مَّا آتَاهَا ”

with the financial condition of both the spouses. (Article 27). Accumulated arrears of maintenance shall not lapse on account of the husband's death or divorce. (Article 32). The wife may refuse to obey the husband against a requirement of the religion, without losing her right to maintenance. (Article 33). She shall, however, lose such right if she leaves his house without his permission and without a lawful reason, or commits an offence, or refuses to travel with him, if he so desires. (Article 25). If the husband fails to provide maintenance, the Court shall direct him to do so and, in the case of his absence, can permit her to borrow in his name. (Articles 29-30).

Section 86. The wife shall be entitled to claim payment to her of the proper maintenance expenses for the past period if the husband has neglected or failed to pay.

COMMENTARY

According to Ḥanafī school of law, the wife cannot claim past maintenance from her husband unless there is an agreement between them or there is a decree of the court entitling her to receive maintenance from her husband. According to Shafi'ī school of law, she is entitled to claim past maintenance.⁴⁰ Same is the opinion of Imām Mālik and Imām Aḥmad b. Ḥanbal.⁴¹ The view point of the three schools of law, i.e. Mālikī, Shāfi'ī and Ḥanbali appears to be more beneficial.

Indo-Pakistan Law :

Past Maintenance : If the husband neglects or refuses to maintain without any lawful cause, the wife may sue him for maintenance in a Civil Court but she is not entitled to a decree for past maintenance, unless the claim is based on a specific agreement. (6 Cal. 631).

Arrears of maintenance: Claim for arrears of maintenance is not justified unless there was a failure on the part of the defendant to provide maintenance. (AIR 1941 Bom. 369). Arrears of maintenance cannot be claimed by a relative. (AIR 1937 Bom. 217. See also AIR 1931 Sind 11 ; AIR 1931 Mad. 234 and 6 Cal 631, but see 41 Mad. 211). The maintenance of a wife is a question relating to marriage and is governed by the personal law of the parties as laid down in section 5, Punjab Laws Act and that the Muhammadan Law by which the parties were governed does not permit of a claim being made for arrears of maintenance unless the same has been previously determined or agreed to by the parties. (2 NW 173

⁴⁰Al-Qudūrī : p. 174. Nasafi : op. cit. p. 153 ; Ibn al-ʿĀbidin : op. cit. vol. ii, p. 676; Ibn-i-Nujaym : op. cit. vol. iv, p. 202.

⁴¹Damad Afandi : Majma ʿal-Anhur, vol. i, p. 498.

and 57 PR 1890). In a suit by a Muhammadan woman against her husband for maintenance the Court, where there has been no previous decree or mutual agreement for maintenance, can only direct maintenance from the date of the decree. Future maintenance should have been given only during the continuance of the marriage and not during the term of the plaintiff's natural life. (6 Cal. 631).

Pakistan Law relating to Past Maintenance :

This has been constant view of the Indo-Pakistan Courts that when the parties are Hanafi Muslims, the wife is held not entitled to past maintenance unless there is an agreement or Court's decree. A Division Bench of the High Court of West Pakistan, Lahore consisting of Anwarul Haq and Mohammad Afzal Cheema, JJ., however, held that the wife can justly claim maintenance from the date of accrual of the cause of action and not necessarily from the date of her first seeking redress i.e. the date of application or filing suit therefor. Their Lordships, in this case relied upon a quotation from the book *Zād al-Ma'ād* of Ibn al-Qayyim, who was an exponent of *Hanbali law*. The learned judges held. "The mere fact that a neglected wife has been hesitant in promptly coming to the Court or has been pursuing alternative remedies out of Court cannot in all fairness be so construed as to deprive her of the right of maintenance from the day when the cause of action accrued to her. The Courts have thus jurisdiction to grant such maintenance subject of course to considerations of limitation and the relevant circumstances of each case." [PLD 1966 (W.P.) Lah. 703 ; 19 DLR (W.P.) 50 (DB) ; Law Notes 1970 Lah. 479].

Suggestion :

The present writer finds himself in agreement with the view taken by their Lordships, which has also been approved by the supreme Court. It may, however, be stated that it has been an established rule of law, which has been upheld by the superior courts of Indo-Pak sub-continent and also the Privy Council, that the Islamic Law of that sect to which the contesting parties belong will be applied to them ; and in case where one party belongs to one school of *fiqh* and the other party belongs to another school of *fiqh*, the rule of law to which the defendant belongs shall apply. In the above case it was not, perhaps, brought to the notice of their Lordships that the parties belonged to the Hanafi school of *fiqh* and as such the Hanbali rule of *fiqh* would not apply to them. In the absence of any statutory provision to the effect that certain rules of one school of *fiqh* would be applicable to the followers of the other schools of *fiqh* as well, the application of a rule of one school in the case of the followers of the other schools may create confusion. The proper step will be that the said rule

of Muslim Law relating to wife's past maintenance be enacted by the National Assembly of Pakistan, as framed above, in the light of the above discussion, by following the rule as expounded by the proponents of the Maliki, Shafi'i and Hanbali schools of law, which the present writer has also adopted and has accordingly codified the law on the subject.

Modes of Recovery :

There are three modes of recovery of maintenance by a wife in Pakistan: first is through the Family Court, under Family Courts Act, 1964 ; the second is under section 488 of the Code of Criminal Procedure, 1898 also through the Family Court ; and the third is under section 9 of Muslim Family Laws Ordinance, 1961 through the Arbitration Council.

The relevant case-law under section 488, Cr. P.C. has been summed up in a case decided by the West Pakistan High Court in *Muhammad Hussain v. Mst. Shakira Begum* (PLD 1963 Kar. 122), which reads as under :

“The above being the present position of the Case-Law on this important question so far as all the High Court in the former sub-continent of India are concerned with the exception of the Madras judge Curgenvin J. in A.I.R. 1972 Mad. 376, I am constrained to adopt this view and to hold that on the facts of this particular case although this applicant and the opponent came together and lived together for a whole month after the original order of maintenance yet this order subsists and the fact that they have again separated entitles the opponent Mst. Shakira Begum to receive the amount of maintenance originally awarded to her by the lady Magistrate.”

The Madras view has been that where the wife comes and lives with the husband even for a few days, she cannot be allowed to rely on the original order of maintenance passed under section 488, Cr. P.C. or to execute that order against her husband. If she separates again from her husband, she must file another petition on a fresh cause of action. *Vankayya v. Reghavammal* (AIR 1942 Mad. 1). *Munuswami Pillai v. Dorakikannu Ammal* (AIR 1947 Mad. 222). *Kuppuswami Padayachi v. Jagadammal* (AIR 1947 Mad. 423). *S. Natesa Pillai v. Jayyammal* (AIR 1960 Mad. 515). A Similar view had been taken by the Rangoon High Court in *Ellen Ma Noo v. Villam Po Thit* (AIR 1931 Rang. 89). The High Courts of Bombay, Calcutta, Allahabad, Nagpur, Orissa, East Punjab have adopted a contrary view that re-union and cohabitation between parties does not put an end to an earlier maintenance order. *Parul Bala Debi v. Satish Chandra Bhattacharjee* (AIR 1923 Cal. 456). *Laxmam Gajiu v. Sitabai Laxman* (AIR 1958 Bom. 14). *Pearay Lal v. Mst. Naraini* (AIR 1935 All. 977). *John P. E.*

Coelho v. Mrs. Blanche Coelho (AIR 1936 Nag. 228). *Casinath Panda v. Padambati Debi* (AIR 1956 Orisa 199). *Mukand Sing v. Mst. Kartar Kaur* (AIR 1958 Punj. 422). and *Mst. Zaunra Bi v. Muhammad Yusuf* (AIR 1930 Lah. 1043). The consistent view of these High Court, however, is that during the period of re-union the order may remain suspended but otherwise it remains in force till it is cancelled on the ground set out in section 488 (5), Cr. P.C. This was also the earlier Madras view in *Kanagammal v. Pandan Nadar* (AIR 1927 Mad. 376).

In *Muhammad Hussain v. Mst. Shakira Begum*, the West Pakistan High Court adopted the view of the majority of the High Courts of the sub-continent. The view of the Lahore High Court has consistently been that an order under Section 488, Cr. P.C. does not come to an end by re-union of the parties or even by a subsequent compromise. In *Fazal Din v. Mst. Fatima* (AIR 1932 Lah. 115), it was held that a subsequent compromise between the parties could have no effect on the order of payment of maintenance.

All these cases under section 488, Cr. P.C whether nullifying the order of maintenance or suspending it can somehow be justified on the language of that section. Section 488, Cr. P.C. provides that if any person having sufficient means neglects or refuses to maintain his wife, a Magistrate inter-alia may on proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife which shall not exceed a sum of Rs. 400. Sub-section (3) of this section provides that if any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance unpaid after the execution of the remaining warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. Proviso (1) to sub-section (3) is to the effect that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her and may make an order under this section notwithstanding such offer. Proviso (2) deals with the period of Limitation for application for issuance of a warrant for recovery. Sub-section (4) provides that no wife refusing to live with the husband without any sufficient cause or living in adultery is entitled to receive any allowance. Under sub-section (5) the Magistrate has been empowered to cancel the order if it is proved that the wife had been living in adultery or had refused to live with the husband without sufficient reasons. The wife is, therefore entitled to maintenance only if she

is not living with the husband and refuses to live with him for sufficient reasons. It can, therefore be urged with force that if she ever starts living with the husband the order for payment will at least remain in a state of suspension as during that period the wife would not be entitled to any maintenance under section 488, Cr. P.C.

“The provisions of section 9 of the Muslim Family Laws Ordinance are however different. Under this section the wife is entitled to maintenance not only when she is not living with the husband but whenever it is proved that the husband fails to maintain her adequately or where there are more wives than one, fails to maintain the wife seeking maintenance equitably. The recovery is also not subject to the condition of failure to comply with the order of payment of maintenance without sufficient cause as has been seen in sub-section (3) of section 488 Cr. P.C. Sub-section (3) of section 9 of the Family Ordinance provides that any amount payable, under sub-section (1) of section (2) if not paid in due time shall be recoverable as arrears of land revenue. The authorities relied upon by the learned counsel for the petitioner or the other authorities about suspension of the order during the period of re-union between the spouses are not, therefore, applicable to a case falling under section 9 of the Family Laws Ordinance. According to this section complete neglect or failure on the part of the husband to maintain the wife is not necessary to be established to attract the provision of this section. Even if it is proved that the wife is being maintained by the husband but the Arbitration Council comes to the conclusion that there is failure to maintain a single wife adequately or in case there is a plurality of wives one of the wives equitably, although the husband and wife are living together the order of payment of maintenance can be passed. The mere re-union therefore, does not make any difference. The provision about recovery is couched in mandatory form. If it is once proved that the amount payable has not been paid it shall be recovered as arrears of land revenue. This leaves no doubt that the order of payment of maintenance is neither terminated nor suspended by any act of parties for so long as they remain husband and wife”. (PLD 1974 Lahore 495, Aftab Husain J.).

Section 87. If the husband is absent, the wife may arrange
Maintenance during husband's absence for her maintenance by borrowing in the name of
 the husband and the lender may recover it from
 her husband, provided her maintenance has been fixed by a
 court.

COMMENTARY

According to Ḥanafī law, if the court has fixed the maintenance of the wife and the husband is absent and he does neither provide maintenance

to her, nor he has the property or business from which the wife may obtain her maintenance, the wife has the right to borrow in the name of her husband and meet her maintenance expenses. The rule of conduct of Imams Mālik, Shafi'ī and Ahmad b. Hanbal on this point is that the wife has an absolute right to borrow for her maintenance on account of her husband's being absent. A prior fixation of her maintenance by a court, therefore, is not necessary.⁴²

In the opinion of the present writer, the point of view of the Hanafis is more expedient and it should be acted upon. It is certainly safer as it has a Court's sanction behind it.

Modern Legislation :

Lebanon :

Maintenance of wife : Articles 92 to 101 of the Ottoman Law as in force in Lebanon make provision for the enforcement of wife's right to maintenance. The Court may, under these provisions, fix up the amount of maintenance to be paid by the husband and, in the event of his failure to do so, authorise the wife to borrow on his credit. The amount of maintenance so borrowed shall be regarded as a debt against the husband.

Syria :

Maintenance : Art. 72. (1) Maintenance of wife shall be binding on the husband from the time of marriage even if the wife is a follower of a different religion and even if she is living with her people, except when the husband asks her to shift to his place and she refuses without any right to do so.

(2) The wife shall have the right of refusal if the husband has not paid the prompt dower or failed to provide a residence as required by law.

Art. 76. The scale of wife's maintenance shall be fixed with regard to the financial condition of the husband provided that it shall not be insufficient for her basic necessities of life.

Art. 78. (1) The Qāḍī can grant a decree of maintenance in favour of a wife with effect from the date when the husband failed to provide it.

Art. 79. The amount of maintenance fixed by the Qāḍī or agreed upon by the spouses shall not lapse except by payment or release.

Art. 82. (1) When proceedings for the recovery of maintenance are pending, the Qāḍī may, after the scale of such maintenance has been fixed,

⁴²Ibid; Ibn Nujaym : op. cit. vol. iv, p. 214.

direct the husband to pay to the wife by way of credit an amount not exceeding one month's maintenance, during the pendency of the proceedings, and may also renew such a direction.

(2) Such a direction shall be executed forthwith.

Art. 84. Maintenance during *'iddat* shall be like the maintenance during marriage. It shall be ordered from the date when *'iddat* became obligatory, but shall not be paid for more than nine months.

Tunisia :

Maintenance of wife : Art. 37. The causes of maintenance-rights are marriage, blood relationship and contractual obligation.

Art. 38. On the husband is binding the maintenance of his wife after consummation of marriage and also after dissolution of marriage during *'iddat*.

Art. 39. Maintenance is not binding on the husband when he is destitute. In such a case, the Court shall give to the husband a period of two months and if he fails to provide maintenance thereafter, shall dissolve the marriage. Where the wife was, at the time of marriage, aware of her husband's financial difficulties, she shall have no right to claim dissolution of marriage.

Art. 40. Where the husband absents himself leaving back his wife, and neither has left property for her maintenance, nor appointed any person to provide maintenance to her during his absence, the Court shall give him one month's time and if he does not come back within that period, shall dissolve the marriage after the wife proves the allegation by statement on oath.

Art. 41. Where the wife spends on her own maintenance with a mind to seek reimbursement from her husband, she shall have a right to do so.

Art. 42. The right of maintenance shall not be lost by the wife by passage of time.

Art. 50. Maintenance includes food, clothing, lodging, education and whatever is regarded as necessary by custom and usage.

Art. 51. Maintenance-right lapses when its basis disappears, and he who provides it without a basis can reclaim it.

Art. 52. The amount of maintenance shall be determined according to the capacity of the person paying it and the status of the person getting it, and with regard to the conditions of time and cost of living.

Art. 53. Where there are several persons entitled to maintenance and the person responsible for it is unable to maintain all of them, the wife shall have precedence over the children and minor children shall be preferred to ascendants.

Section 88. If the husband neglects or commits default in providing maintenance for his wife, she is entitled to apply to a court seeking imprisonment of her husband. The court shall in the first instance order payment of the maintenance expenses. In case the husband, inspite of the order passed, fails to pay the maintenance expenses, the court shall sentence him to imprisonment not exceeding one month at a time.

Imprisonment
on account of
non-payment of
maintenance

COMMENTARY

Islāmic law confers upon the wife the right of filing a complaint in court if the husband neglects or defaults continuously in providing maintenance to his wife. The court thereupon shall pass an order against the husband for payment of maintenance expenses. If the husband, inspite of the order passed, fails to pay the maintenance amount the court is empowered to pass an order for the husband's imprisonment for a fixed period.⁴³ Some of the jurists have prescribed one month's imprisonment on account of non-payment of maintenance expenses and some others have specified the period of imprisonment to be three months. To this writer, one month's imprisonment is preferable. And if the husband undergoing imprisonment pays the maintenance allowance to his wife, he shall be at once set free.

Pakistan Law :

It has been provided under section 488 of Code of Criminal Procedure (1898) of Pakistan that if an order has been passed by the Court for paying maintenance to wife (and children also) and he fails to pay the same, he may be ordered to be imprisoned in jail for one month.

Section 89. (i) An agreement to pay maintenance to the wife, whether *ante nuptial* or *post nuptial*, fixing conditions as to the amount in certain eventualities declared under the Sharī'ah to be valid, is enforceable in law.

Agreement for
maintenance

(ii) An agreement between the husband and wife that no maintenance shall be due on the husband or undertaking by the wife that she would not claim her maintenance allowance from the husband shall be void.

⁴³Damad Afandi : op. cit. vol. i, p. 499; Ibn Nujaym : op. cit. vol. iv, p. 212.

COMMENTARY

The liability of the husband for providing maintenance to his wife is a part of the fulfilment of the purposes of a marriage contract. It is based on socio-economic expediency. Hence any contract that affects this right of the wife shall be in-operative, in as much as such a contract, according to *Shari'ah*, is contrary to public policy. The wife may, however, release her husband from past liability, but not from future maintenance exceeding one month.^{43a}

Indo-Pakistan Law:

Agreement for maintenance : A stipulation by a Muslim husband to make an allowance to his wife in case of separation is not against the rule of public policy. (AIR 1929 Lah. 660 ; AIR 1928 Oudh 303 ; AIR 1921 All. 152 ; AIR 1962 Oudh 251—69 I.C. 778 ; AIR 1921 All. 152).

Settlement of property for maintenance : Settlement by husband on wife (for maintenance) for her life—husband pronounced Talaq—held : the wife has a right to recover possession of property settled. (AIR 1951 Mad. 992).

Transfer of usufruct for maintenance : Where maintenance right is a transfer of the right to the usufruct ; it is a transaction of '*Āriyat*' and not of a gift under the Muslim Law. (AIR 1926 Oudh 360). '*Āriyat*' is revocable, is for a definite period, is not heritable and is not a transfer of property. (AIR 1925 Oudh 289).

Agreement for maintenance : A wife may apply for an order of maintenance under the provisions of Section 488, the Code of Criminal Procedure, 1898, in which case the Court may order the husband to make a monthly allowance for her maintenance not exceeding fifty rupees. In Muhammadan Law, marriage is a civil contract and any *ante-nuptial* agreement that the husband would be liable to pay for maintenance by a specified monthly allowances if the relations between them become bad, is valid, (1947 JLR 259). Now this amount has been enhanced to Rs. 400 in Pakistan.

In Muhammadan Law, a wife can make the husband stipulate that he would not remove her from her parental home and such a contract is valid. Likewise he can also validly contract to pay her expenses at that place as well. Consequently an agreement to pay alimony to the wife in her paternal home in case of disagreement is not against public policy. (AIR 1936 Pesh. 195). Where there was an *ante-nuptial* agreement between the husband and wife that if the relations between them became bad the husband would be liable to pay separate maintenance to the wife at a certain rate and in a suit by the wife the husband pleaded that the wife was immoral and that he had complained to the Police about it, it was held by the Court : (i) that in

^{43a}Fatawā 'Ālamgiriyyah, vol. ii p. 145.

Muhammadan Law, marriage was a civil contract and conditions in *ante-nuptial* agreements like this, were not void ; (ii) that the plea of the defendant was sufficient, even in the absence of other evidence, to show that the relations had become strained and the wife was entitled to get separate maintenance. (AIR 1932 Lah. 65).

Incidence of transfer of property : Where a Muhammadan wife, in reconveying to her husband the property received from him in lieu of dower, took from him a written agreement in which he covenanted to pay her a certain sum of money annually without objection or demur, it was held that the husband could not avoid payment on any of the pleas on which a Muhammadan husband could avoid the payment of maintenance to a wife. (15 WR 296).

Kharcha Pandan: The suit was brought by the plaintiff, a Muhammadan lady, against the defendant, her father-in-law, to recover arrears of a certain allowance called *Kharcha-i-pandan* under the terms of an agreement executed by him prior to and in consideration of her marriage. At the time of the execution of the agreement, which recited that the marriage was fixed for a certain date and that therefore the defendant declared of his own free will and accord that he "shall continue to pay Rs. 500 per month in perpetuity to the plaintiff for her betel-leaf expenses etc., from the date of the marriage, i.e., from the date of her reception," out of the income of certain properties therein specifically charged for the payment of the allowance : It was held that although the plaintiff was not a party to the agreement, she was clearly entitled to proceed in equity to enforce her claim, and that the rule of common law that a person not a party to an agreement could not take advantage of its provisions, was not applied to the facts and circumstances of the present case, where the agreement executed by the defendant specifically charged immovable property for the allowance which he bound himself to pay to the plaintiff, who was the only person beneficially entitled under it. (31 All. 410).

Agreement to pay alimony : In Muslim law, a wife can make the husband stipulate that he would not remove her from her paternal home and such a contract is valid. Likewise he can also validly contract to pay her expenses at that place as well. Consequently an agreement to the wife in her paternal home in case of disagreement is not against public policy. (A I R 1936 Pesh. 195).

Pakistan Law :

Regarding agreement to pay separate maintenance it was observed by a Division Bench of the West Pakistan High Court, Karachi, consisting of Qadeeruddin Ahamad and Ilahi Bakhsh Khamisani, JJ. in the case of *Muhammad*

Yasin vs. Khushnuma Khatun, Karachi Weekly Law Reports (Vol. 2), No. 29 1961, p. 65 “that under Muhammadan Law the contract of marriage has for its “design and object” the unity of the lives of wife and husband for themselves and for the family they raise. It is instituted to meet one of the “prime and original necessities” of life and meant to bring “solace” to human life. The spouses have a right to claim and enjoy their bodily union, and the wife is under an obligation to obey her husband at least within reasonable limits”. Dealing with the standard of reasonableness their Lordship held that the standard must be set by Muhammadan Law, which does not countenance disobedience of the wife and her denial to give company to her husband on fanciful grounds, much less does it tolerate elements of self destruction in marriage. No religion or accepted public policy tolerates it. There is no real difference in principle between ante-nuptial and post-nuptial agreements providing that the husband should pay maintenance to the wife if she was displeased and lived separately but different consideration would apply when facts disclose that the unhappiness of the wife was justified and that after experience the parties made a provision by an agreement to have intact the chances of reconciliation and happier union. We believe that an agreement so designed would be good in Law, but think that an agreement calculated to provide for indefinite separation under the tie of marriage cannot be upheld. It was held further that if wife accepts the situation and it is presumed that the arrangement does not strain her moral stability, the husband’s obligation in such a situation to maintain her and thus to provide her with the means to continue to live separately would be inconsistent with the design and object of Muhammadan marriage. In the case shortly before “*nikah*” the husband executed an agreement the third term (condition) of which was as follows :—

“Thirdly, if God forbids, there be any disagreement between me and my wife, I shall every month pay to her one-third of my income as her maintenance. If I fail to do so, my wife, Khwaja Abdul Waheed Saheb and Khwaja Muhammad Alam Saheb, brothers of my wife, shall be entitled to recover it through Court from my moveable and immoveable property”.

Turning to the third term of the agreement noted above, their Lordships observed, “We find it obvious from the record that there was no reason for the respondent (wife) to expect ill-treatment from her prospective husband, but she was not certain whether the union would make her life happy and therefore, she made it a condition of marriage that if there was disagreement she would be paid one-third of the income of the prospective husband. The nature of disagreement was not specified. If she happened not to like her husband or later developed abhorrence for him,

there could be disagreement between the two; or if she developed objectionable familiarity with somebody and the husband objected to it, they would disagree. If they disagreed she could demand and recover maintenance from the husband and could go her own way with her independent means to live separately, as if they were not wife and husband". It was thus held, "that the third term of the agreement under review defeats the provisions of Muhammadan Law. It is also opposed to public policy, and as such void under Section 23 of the Contract Act.

Section 90 A wife is entitled to maintenance during her period of probation (*iddat*) due on divorce, whether the divorce is revocable or irrevocable.

Maintenance during '*iddat*'

COMMENTARY

According to Hanafis a woman who is divorced is entitled to receive her maintenance allowance from her husband whether she is divorced revocably or irrevocably. Imam Shafi'i, however, holds that she is entitled to maintenance only if she has been revocably divorced. There is, however, a consensus of opinion that she is not entitled to maintenance if she is undergoing '*iddat*' on death of her husband.

Maintenance during 'iddat on husband's death : The wife is entitled to maintenance during the '*iddat*' consequent upon divorce but a widow is not entitled to maintenance during the '*iddat*' consequent upon her husband's death. There is however, difference of opinion about widow's right to maintenance if she is expecting a child. According to one opinion she shall be entitled to maintenance in such a case.^{45a}

Indo-Pakistan Law :

Maintenance during 'iddat : A Muslim wife is entitled to maintenance from her husband, after divorce, for the period of *iddat* and for the period between the expiry of the period of *iddat* and her receiving notice of the Talaq (AIR 1933 Cal. 27).

Wife is entitled to be maintained by the husband until the day she comes to know of the Talaq declared by her husband in her absence. Till the Talaq is communicated to her it cannot be acted upon. (AIR 1944 Mad. 227; *Mst. Mariam vs. Kadir Bakhsh*, 1929 A. I. R. Oudh, 527; *Rashid Ahmad vs. Anisa Khatun*, (1932) 59 I. A. 21, 27; 135 I. C. 762; *Ahmad Kasim vs. Khatun Bibi* 141 I. C. 689; *Azmatullah vs. Imtiyaz Begum*, P. L. D. 1959 Lah. 167.

^{45a}Ibn Abidin : op. cit. vol. ii p. 922.

Order of maintenance under Criminal Procedure Code, 1908, Sec. 488 : Where an order is made for the maintenance of a wife under section 488 of the Criminal Procedure Code, and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of 'iddat.

In re Abdul Ali (1883) 7 Bom. 180 ; *In re Din Muhammad* (1882) 5 All. 226; *Shah Abu vs. Ulfat Bibi* (1896) 19 All. 50; *Ahmad Kasim vs. Khatun Bibi* (1932) 59 Cal. 833, 847; 141 I.C. 689; *Mohd. Shamsuddin vs. Noor Jehan Begum* (1955) Hyd. 418; AIR 1955 Hyd. 144; *Amad Giri vs. Mst. Begha* AIR 1955, J.&K. 1). The result is that a Muslim may defeat an order passed against him under Section 488 by divorcing his wife immediately after the order is passed. His obligation to maintain his wife will cease in that case on the expiry of her 'iddat period due on divorce, i.e., three months.

Maintenance during 'iddat : A wife can obtain maintenance against her husband during the period of iddat and was entitled to it for three months (AIR 1929 Oudh 527 ; 5 All. 226 and 19 All. 50).

Section 91. No wife shall be entitled to seek separation on account of her husband's poverty except when the Court arrives at the conclusion that there is no possibility of the husband having sufficient means in the near future and there is the likelihood of the wife getting led astray from the virtuous path.

COMMENTARY

According to Ḥanafi law, if the husband avoids providing maintenance to his wife, even due to his poverty, separation shall not be effected between them. The Ḥanafis in support of their contention, quote the Qur'ānic verse "Let the man of means spend according to his means ; and the man whose resources are restricted, let him spend according to what Allāh has given him. Thus one should spend from what Allah has bestowed upon him, because Allah puts no burden on any person, beyond what He has given him. After a difficulty Allah will soon grant relief.^{45a}" The other contention of the Ḥanafis is that among the Companions of the Prophet there were some who were well to do and some who were very poor, but not a single instance is to be found during the Prophet's period that separation between the spouses was effected on account of the poverty, stinginess or non-providing of maintenance by the husband.

According to Ḥanafis, if the husband in spite of his being well to do avoids providing maintenance to his wife the court, instead of passing order

^{45a}Al-Qur'ān, surah *Al-Talaq* : (The Divorce), 1xv : 7.

for separation, shall order for his imprisonment or order for his property being sold and the maintenance expenses being paid out of it to the wife. If the non-providing of maintenance be due to the husband's poverty, he shall be given proper time for its payment. Allah has said, "After a difficulty, He will soon create relief." According to Ḥanafis, if such a suit is brought before a Court, the first order that should be passed is that the maintenance expenses of the wife should be met by borrowing in the name of the husband. Shi'ah 'Ulamā' also appear to be in agreement with the Ḥanafī's point of view.

The point of view of Imams Malik, Shafi'ī and Aḥmad b. Ḥanbal is that the husband, if he avoids providing maintenance to his wife, separation shall be effected between them in as much as in such cases, keeping the woman in wedlock amounts to perpetrating cruelty on her in perpetuity. Allāh has prohibited to retain them (the wives) for persecuting them.⁴⁶ It is cruelty to compel a wife to remain in the wedlock of such a husband and to do away with it is the duty of every court. Hence, when the husband is not agreeable to dissolve the marriage, the court in having jurisdiction shall be empowered, according to the present writer, to order for separation between them.

Analysis :

The view point of the Ḥanafīs that the Court shall at first order for meeting expenses of wife's maintenance by her borrowing in the name of her husband, carries practical difficulties with it. Ordinarily, no permanent provision for maintenance can be made by raising loans. In my view, therefore, the duty of the court is to see whether in the near future there is any possibility of the husband acquiring capability of providing maintenance to her. If there be no such possibility and there be an apprehension of the wife going astray from the path of virtue on account of husband's poverty, it shall be the duty of the court to get separation effected between them. The view of Imam Shāfi'ī that separation should be effected on the ground of husband's poverty and his non-capacity of providing maintenance to his wife appears to be proper. Indeed, in such cases it will be appropriate to give some time to the husband before effecting separation.

Adoption of the rule of another Sunnī Imam : It is explained in Sharh al-Wiqayah that the Hanafī jurists found that the wife could not live without maintenance and that to get a loan was difficult while the betterment of the husband's financial condition was very uncertain. They therefore thought it proper that the Hanafī Qadi should entrust such a case to a

⁴⁶Al-Qur'ān surah Al-Baqara : (The Cow), 11 : 23,

”ولا تمسكوهن ضاراً لتعتدوا“

Qadi of a Shafi'i sect so that the latter would separate the parties. (Sharh al-Wiqayah, Delhi, 1940 vol. ii, p. 174). The same view has been expressed in Radd-al-Muhtar. (Ibn 'Abidin, op. cit., Vol. ii p. 903). In modern times when the system of appointing separate Qadis for different sects is not in vogue, a Family Court shall be competent to pass a decree for dissolution of marriage on the ground of non-providing maintenance by the husband to his wife.

The grounds given by the Hanafi jurists in support of their view that a marriage cannot be dissolved on the husband's inability or failure to maintain the wife do not appear in the present conditions of the Society to take the realities of life into consideration. If a husband fails to support his wife then there seems to be no reason why relief should not be given to her. It is necessary in such a case to adopt the law of another Sunnī sect and to release the wife from hardship by dissolving the marriage-tie. It may however be remarked that a wife who was not being supported by her husband could, in early period of Islam, receive financial help from the Bayt al-Mal or Public Treasury and so did not experience such hardships as befall a wife in modern times. There is a possibility that a wife deprived of financial support may succumb to immorality rather than face starvation. These circumstances were generally not faced by wives in old times.

The Şhafi'i, Maliki and Hanbali laws provide for the dissolution of marriage when the husband is so poor as to be unable to maintain the wife or when he is capable of maintaining the wife, but fails or refuses to do so.

It has been stated above that the Hanafi law confines itself to imprisonment of a husband who does not support his wife. It does not stand for the dissolution of the marriage. But, as stated before, the Hanafis can adopt the law of any other Sunni sect when their own law involves hardship. Hence a Hanafi marriage can be dissolved by adopting the provisions of the Şhafi'i, Maliki or Hanbali laws.

Suggestion :

The present writer, therefore, recommends the adoption of the law as interpreted by another Imam of the Sunni sect provided the situation is of a critical nature and of general calamity^{46b}.

Nature of Separation :

The separation effected on the ground of non-providing maintenance shall be in the category of a revocable divorce. If the husband, proves to the

^{46b} (Mawlana Ashraf 'Ali Thanwi; al-Hīlat al-Nā'izah, Karachi, n. d. p. 118).

satisfaction of the court that he is affluent and is capable of providing maintenance to his wife and is prepared to provide maintenance to her, he shall have the right to have recourse to his wife, provided her period of probation has not expired.⁴⁷

Modern Legislation :

Iraq, Egypt, Jordan & Syria :

Laws in connection with effecting separation on the ground of non-providing of maintenance to wife have been enacted in several Muslim countries. Under Section 45 of the Qanun al-Ahwal al-Shakhsiya of Iraq the wife has been given the right of presenting a petition for separation in court in the event of husband's non-providing maintenance to her without any legal cause. The court shall order the husband to provide maintenance to his wife within a period of sixty days. Similary under the current Egyptian law, if the husband is unable to provide maintenance to his wife within a period of one month, the court shall pass order for separation, provided the husband apparently has no property from which the wife may meet her maintenance expenditure. Under Section 91 of Ḥuqāq Al-'A'īlah al-Urdunī, in the event of non-providing maintenance for a year, the court shall pass order for separation. Under Section 110 of the Qanūn-al-Aḥwāl al-Shakhsyah of Syria, the wife has been given the right of separation in the event of the husband being available and his avoiding to provide maintenance without any cause to her. If, however, he satisfies the court of his inability to do so, the court shall grant him three month's time during which it shall be necessary for him to provide the maintenance. In case of his default, separation shall be effected. It has been explained under the said law that such separation shall be in the category of a revocable divorce. If the husband is able to arrange for the maintenance during her period of probation and provide maintenance to her, he shall have the right of having recourse to his wife.

Sudan :

Under Circular No. 17 of 1916, articles 1 to 9 of Sudan it has been provided the if a husband owns property out of which his wife can obtain maintenance, a decree for the same to which she is entitled under law may be executed out of such property. If a third person owes a debt or a deposit to the husband or has in his possession the latter's property, the wife can prove this before the Court in order to obtain her maintenance therefrom. If

⁴⁷Qanūn al-Aḥwāl Al-Shakhsia, Syria, Sec. 111,

تفريق القاضي لعدم الانفاق يقع رجعيًا وللزوج ان يراجع زوجته في العدة بشرط ان يثبت يساره ويستعد لانفاق -

the husband has no known property out of which a maintenance order can be executed, the wife can demand dissolution of her marriage, which shall be granted forthwith. But if the husband is a destitute, he shall first be given by the Court a period of respite. If a husband, who has no known property from which a maintenance order can be executed, goes away leaving his wife without maintenance, she may demand dissolution of her marriage. In such a case, if the husband can be contacted, he shall be asked by the Court to arrange for her maintenance within a specified period; if he fails to do so without any excuse, the Court may dissolve the marriage. On the other hand, if he cannot be contacted or has disappeared completely or is of unknown whereabouts (*mafqud al-khabar*), the marriage may be dissolved without delay. The Court's order under these provisions dissolving a marriage shall effect a revocable divorce. The husband can revoke it during the period of 'iddat if he is prepared to provide maintenance.

Morocco :

Under the law of Morocco, for want of maintenance it has been provided that the wife may demand from the Qāḍī dissolution of marriage when her husband is present but neglects to maintain her. In such cases, if the husband has known property, the Qāḍī shall order for payment of maintenance from such property. Where there is no known property and the husband, who is not destitute, persists in not maintaining his wife, dissolution of marriage shall be granted forthwith. If the husband establishes that he is unable to provide maintenance to the wife, the Qāḍī shall give him a period of respite not exceeding three months, and after the expiry of that period, if the husband still cannot provide maintenance, shall grant dissolution of marriage. [Art. 51 (1)]. It has been further provided that dissolution of marriage granted under this article shall constitute a divorce revocable by the husband during the period of 'iddat if he expresses his willingness for, and is capable of, providing maintenance to the wife.

Iran :

The Iranian Law, dealing with the wife's right to maintenance, provides that if an order of the Court directing the husband to provide maintenance to the wife, issued on her application, cannot be executed, she may demand dissolution of marriage by the Court. It further permits the wife to live separately from her husband, without losing her right to maintenance, if she has left her husband's house due to a fear of unbearable physical injury or monetary loss.

Pakistan Law :

Under Section 2(ii) of the Pakistan Dissolution of Muslim Women's Marriages Act, 1939 a Muslim wife has been given the right of claiming

dissolution of marriage, inter alia, on the ground that the husband has refused or neglected to provide maintenance to her for the period of two years. The application of the clause is, however, subject to the general provisions of the Muslim law. Thus, a wife is not entitled to invoke this clause when she herself is at fault. A wife who is *nashizah* or refractory under the Muslim law is not entitled to maintenance and so her marriage cannot be dissolved on the ground that the husband has failed to maintain her for the prescribed period. It has been held by the Courts in Pakistan that a wife who refuses to return to her husband without sufficient cause is not entitled to maintenance^{47a}.

Suggestion :

It is an undeniable fact that very often suits for maintenance (and other family suit also) takes years to get the matter decided by a court of law and the woman remains a prey to untold miseries. In the special circumstances of our country where women are generally not able to earn their livelihood a wife's right of demanding dissolution of marriage conditioned with two years neglect or refusal in providing maintenance to her, requires sympathetic consideration. The wife, in the opinion of the present writer, should be given a right to present a petition in a Family Court demanding separation in the event of husband's failure or neglect without a just cause, prescribing a time-limit of six months. If the Court after consideration of the husband's default for non-providing maintenance as well as his financial circumstances, comes to the conclusion that there are no valid reasons for non-providing maintenance by the husband and he is also not poverty-stricken, it should, without delay, order for separation. If the husband is unable to provide maintenance to his wife due to his poverty and there be sufficient reason to believe that there is no possibility in the near future for his earning sufficiently so as to provide maintenance to wife, the court should, without delay, order separation, specially when there is an apprehension of wife going astray from the path of virtue due to husband's poverty.

However, if there is a possibility for husband's earning enough to maintain his wife, he should be allowed proper time. If he does not prove his means and capacity and readiness to provide maintenance to his wife within the time allowed by Court, an order for separation should be passed by the Court.

^{47a} (*Majida Khatoon v. Paghalo Mohammad* PLD 1963 Dacca 583 ; *Sardar Muhammad v. Nasima Bibi*, PLD 1966 Lah. 7).

CHAPTER—X

Restitution of Conjugal Rights

Section 92. The spouses may file a suit against each other for restitution of conjugal rights in a competent Court of law, and the Court in appropriate cases may pass decree for restitution of conjugal rights on such terms and conditions as deemed necessary and proper in the circumstances of each case.

COMMENTARY

Generally it is considered that it is the husband who may file a suit for restitution of conjugal rights, but, in fact, the wife, too, has a right corresponding to that of the husband to demand the fulfilment of his marital duties towards her.¹ She has also a right, if the husband has more than one wife, to be treated on terms of strict equality with other wives, as enshrined in the Holy Qur'an and the *Sunnah* of the Prophet.

Muslim law is more beneficial to women : It may be remarked, by the way, that the Muslim Law on the subject of the conjugal residence is very much in advance of the Jewish as well as the Roman Law. Under the Jewish law, a woman who refused to follow her husband wherever he desired to go, lost her right to her dower and the possessions which she brought from her parents' home, together with all rights which the law conferred on her. Under the Roman Law, a wife followed the residence of her husband without the least right to question his choice. This principle has been imported into the modern English Law. The Code Napoleon provides that "the woman is obliged to live with her husband and to follow him wherever he proposes to reside;" (Art. 214) the consequence being that, however objectionable a place may be, the wife has no option in the matter. The Muslim Law lays down distinctly that a wife is bound to live with her husband, and to follow him wherever he desires to go unless excused by a valid cause justifiable in the eye of Shari'ah. Some jurists are, however, inclined to hold that the wife may refuse to go with him to Dār al-Harb²

¹Al-Wajiz, Cairo, vol. ii, p. 20; Abdur Rahim; Muhammadan Jurisprudence, Lahore, 1963, p. 334.

²Abdul v. Hussenbi (1904) 6 Bom. LR 726; Imam Ali v. Arfatunnissa 21 IC 87 and Fatima Bibi v. Noor Mohammad (1920) 1 Lah. 597.

(non-Muslim territory where the Islamic laws are not enforceable). On wife's refusal to accompany her husband, without sufficient or valid reason, the Courts of Justice, on a suit for restitution of conjugal rights by the husband, would order her to live with her husband.

Wife not entitled to refuse : The wife cannot refuse to live with her husband on pretexts like the following :—

- (1) That she wishes to live with her parents.
- (2) That the residence chosen by the husband is distant from the home of her parents.
- (3) That she does not wish to remain away from the place of her birth.
- (4) That the climate of the place where the husband has established his domicile is likely to be injurious to her health.
- (5) That she detests her husband.
- (6) That the husband ill-treats her frequently (unless such ill-treatment is actually proved, which would justify Qadī to grant a separation).

Indo-Pakistan Law :

The Dissolution of Muslim Marriages Act, 1939, as in force in Indo-Pakistan sub-continent, applies only in the case of a suit by a wife and, therefore, does not make available to the wife the benefits or rights given to her in a suit filed by the husband for the restitution of conjugal rights³. In fact the general Muslim Law applies in such a case. If a wife refuses to cohabit with her husband without lawful cause he may sue her for restitution of conjugal rights.⁴

In family cases, as the husband is dominant in matrimonial matters, the Court, generally, leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief. (59 Bom. 426). It is considered necessary for the husband to come to court with clean hands, otherwise the relief would not be granted to him. (PLD 1959 Lah. 710).

Restitution of conjugal Rights : Marriage confers important rights and entails corresponding obligations both on the husband and on the wife. Some of these rights are capable of being modified by an agreement freely entered into by the parties, but it should not be contrary to the main

³AIR 1960 Calcutta, 717 (D.B).

⁴II MIA 551.

obligations arising out of a marriage contract as laid down by the *Sharī'ah*, so as to negate the very object of marriage.

Obligation not Absolute: An important obligation is 'consortium' which not only means living together, but implies a union of fortunes. A fundamental principle of matrimonial law is that one spouse is entitled to the society of the other. Thus where a wife, without lawful cause, refuses to live with her husband, he is entitled to sue for restitution of conjugal rights and similarly the wife has the right to demand the fulfilment by the husband of his marital duties. This right of the husband, however, is not absolute. The Qur'ān enjoins husbands to retain their wives with kindness or to part with them with an equal consideration. Whenever a case of this nature arises it is to be borne in mind that, as the Muslim husband is dominant in matrimonial matters, the Court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief.⁵ The law, however, does recognize circumstances which would justify her refusal to live with him.

As already stated, the obligation of the woman, however, to live with her husband is not absolute. The law recognises circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal residence or ask the assistance of a Court of Justice.⁶ In a suit for restitution of conjugal rights by a Muslim husband against his first wife after he has taken a second one, the Court will refuse the relief if the circumstances reveal that in taking a second wife the husband has been guilty of such conduct as to make it inequitable to compel the first wife to live with him.⁷ Where the plaintiff (husband) has married two wives, and has failed to prove that he has been treating both of them on equal footing, decree for restitution of conjugal rights will be refused. The bad conduct or gross neglect of the husband is, under the Muslim Law, a good defence to a suit brought by him for restitution of conjugal rights.⁸

⁵*Abdul Rahman v. Aminabai* (1935) 59 Bom 426.

⁶*Itwari v. Sm. Asghari* AIR 1960 All. 684.

⁷*Mulkan Bibi v. Mohammad Wazir Khan* P L D 1959 Lah. 710.

⁸*Buzloor Ruheem v. Shumsoon-nissa Begum*, *infra*. See *Meharally v. Shekarknamoobai* (1905) 7 Bom. L R 602; *Hussaini Begum v. Mohammad* (1907) 29 All. 222; *Hamid Hussain v. Kubra Begum* I L R 40 All. 332; *Genu Meah v. Begummah Bibi* A I R 1933 Rang. 322 and *Sofia Begum v. Zaheer Hasan* A I R 1947 All. 16.

Nature of the suit for Restitution of Conjugal Rights : Suit for the restitution of conjugal rights is in the nature of a suit for specific performance and the Court of justice has the usual discretion to grant relief on such terms as it considers just⁹.

Modern Legislation—Jurisdiction :

Pakistan : The jurisdiction to try marital disputes, as detailed in the Schedule attached to the West Pakistan Family Courts Act, 1964, vests exclusively in a Family Court set up under the said Act. Restitution of conjugal rights is one of them. The relevant provision of Section 5 of the Family Courts Act, 1964 reads as under :—

“Subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule”. The Schedule comprises of the following matters : (1) Dissolution of Marriage, (2) Dower, (3) Maintenance, (4) Restitution of Conjugal Rights, (5) Custody of Children, (6) Guardianship, (7) Jactitation of Marriage.

Suggestion :

In the Schedule to the Family Courts Act seven categories of cases are mentioned which are triable by a Family Court. The case for the return of dowry is not included in the Schedule with the result that a Family Court cannot entertain her claim for return of dowry and for that she has to file a suit in an ordinary civil court. The expense and difficulty faced by a woman in such a case is quite evident. It is thus, suggested that Schedule to the Act should be amended to include dowry and all disputes relating to marriage.

Pecuniary jurisdiction of Family Courts : Family Courts have unlimited pecuniary jurisdiction. They are not ordinary courts whose jurisdiction is limited by the West Pakistan Civil Courts Ordinance, 1962 to Rs 25,000/- (PLD 1968 Kar. 630).

Family Courts, Nature of : The provisions of the Family Courts Act, 1964 make it clear that the intention of law is to set up Courts and entrust matters to them in their capacity as Courts and not as *persona designata*. A Family Court is, therefore, a Court of law as contemplated in Article 102 read with Article 242 of the Constitution of 1962 (PLD 1968 Kar. 630).

⁹*Anis Begum v. Muhammad Istafa Wali Khan* A I R 1933 All. 634; 35. A 743; 148 IC 26; *Shakuran v. Abdul Majid* A I R 1955 N U C 202.

Dissolution of marriage and Restitution of conjugal rights :

A decree for dissolution of marriage on the ground of failure of the husband to maintain the wife and also to perform marital obligations, and also on the ground that the husband had deprived the wife of her ornaments and misappropriated them, was not appealable under this section. (Law Notes 1973 Lah. 4). Where dissolution of marriage has been decreed by the Family Court, a suit for restitution of conjugal right by the husband fails. Therefore, although there is no clear prohibition against an appeal from an order of a Family Court refusing restitution of conjugal rights, yet keeping in view the object of the law and clear command of the Legislature, no appeal would be competent against an order, refusing restitution of conjugal rights, where a decree for dissolution of marriage has been passed. [PLD 1968 Lah. 309 (DB)].

Section 93. A decree for the restitution of conjugal rights shall not, inter-alia, be passed in the following cases:—

- (i) Cruelty, (ii) Non payment of prompt dower, (iii) False charge of adultery, (iv) Reprehensible conduct, (v) Option of puberty having been exercised, (vi) Irregular marriage, (vii) Inequitable treatment in case of plurality of wives.

Exception.—The court may, however, pass a conditional decree for restitution of conjugal rights on payment of prompt dower, in case the prompt dower has not been paid and the suit is resisted on that ground.

COMMENTARY

Where a party to marriage without lawful cause ceases to cohabit with the other partner, the latter may sue the former for the restitution of conjugal rights. In the case of *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* [(1867) 11 Moo. I A 551 ; See also *Husaini Begum v. Muhammad Rustam Ali Khan* (1906) I L 29 All. 222], the Privy Council dealt in broad terms with the principles of the Muhammadan Law which regulate the relations between husband and wife, and its enunciations are so conformable with the spirit of the Islamic system that they deserve careful study. In substance it held that a suit for restitution of conjugal rights will lie in a Civil Court by a Muhammadan husband to enforce his marital rights; and that in such a suit he would be entitled to a decree for the

return of the wife. But if there be cruelty to a degree rendering it unsafe for her to return to his dominion, or if there be a gross failure on his part to perform the obligations imposed on him by the marriage contract for the benefit of the wife, if properly proved, it would afford sufficient grounds for refusing the husband any relief in the suit. [See *Abdul Kadir v. Salima* (1886), I L 8 All. 149]. In a suit for restitution of conjugal rights the Court is vested with the power to constrain the recalcitrant party to resume connubial relationship. Under the provisions of the Civil Procedure Code, a decree in an action brought for that purpose may be enforced by attachment of the defaulters's property or by detention in the civil prison for a term not exceeding six months or both. (Rule 32, Order XXI, Act V of 1908). The Muslim Law also provides imprisonment for disobedience of the orders of the Court.

If the action is brought by the husband, the wife is entitled to plead as a defence, besides habitual ill-treatment, gross cruelty. In the case of *Duler Keor v. Dwarka Nath Misser* (1905) I L 34 Cal. 971, the Calcutta High Court has held that when a husband introduces into the conjugal domicile a low caste woman as his mistress, to live with him as a member of the family and expels at her instance his wife and son from the house, his conduct amounts to cruelty within the meaning of the law as would justify the Court to refuse in his suit restitution of conjugal rights. The principle of that case would be applicable to Muslims as well.

The husband who has been expelled from the caste cannot be granted a decree for restitution of conjugal right¹⁰ or that the wife has not been paid her *exigible* or *prompt* dower, or that she had rescinded the contract in the exercise of the "option of puberty"¹¹. The husband is not entitled to the decree of restitution of conjugal rights if the marriage took place during the minority of the wife and has been validly repudiated. In a suit for restitution of conjugal rights by the husband against the first wife after having married a second one, it was held that the husband has been guilty of such conduct as to make it inequitable for the Court to compel the first wife to live with him and the relief was refused.

Defences to a suit for restitution of conjugal rights: There are a number of valid defences to a suit for restitution of conjugal rights, as approved in several cases. The leading case on the subject is *Moonshee Buzloor Ruheem v. Shumsoonnisa Begum* [(1867) 11 M. I. A. 551]. The

¹⁰ *Bai Jina v. Kharwa Jina* (1907) 31 Bom. 366.

¹¹ *Mst. Bhawan v. Gaman* A I R 1934 Lah. 77 and *Abdul Karim v. Amina Bibi* A I R 1935 Bom. 308; I L R 59 Bom. 426. See also *Itwari v. Smt. Asghari* A I R 1960 All. 684.

relations between a Muslim husband and his wife were considered in broad terms and it was held that a suit for restitution of conjugal rights would lie in a Civil Court by a Muslim husband to enforce his marital rights; but if there were cruelty to a degree rendering it unsafe for her to return to his dominion, or if there were a gross failure on his part to perform the obligation imposed on him by the marriage contract, the Court would be justified in refusing such relief. In *Anis Begum v. Muhammad Istafa* [(1933) 55 All. 743], it was laid down by Sulaiman C.J. that the Courts in this country have a large discretion when a suit is brought for restitution of conjugal rights. It was established in this case that the husband was keeping a mistress in the same house with his wife, and that when quarrels ensued on that account he treated his wife cruelly. The Court, while decreeing restitution, imposed certain conditions on the husband, namely, that unless he gave an undertaking not to keep any mistress in the house, a separate house should be provided for the wife, also two servants of her choice for her personal safety.

A decree for the restitution of conjugal rights cannot however be passed in the following cases :—

Cruelty to wife : In a suit for restitution of conjugal rights, when it is not safe for the wife to return to her husband,¹² cruelty would be a valid defence where it is of such a character as to render it unsafe for the wife to return to her husband's house. [AIR 1960 Pat. 293 (DB)]. It may be actual violence, infringing the right to safety of life, limb and health, or reasonable apprehension of such violence, (33 Mad. 22), or charges of immorality and adultery, and the heaping of insults, (29 All 222), or failure on the part of the husband to perform the obligations imposed on him by the marriage contract, (11 M.I.A. 551), or where there has been prolonged criminal and civil litigation between the parties. (Law Notes 1971 Lah. 738). The question of cruelty depends upon the facts alleged and proved. In an Allahabad case, a suit for restitution was filed by the husband. An unsigned letter, proved to have been written by the wife to her father, complaining of cruelty on the part of the husband, was taken into consideration and the relief was refused. ¹³

¹² *Moonshee Buzloor Raheem v. Shamsoon Nissa Begum* (1867) 11 M I A 551; *Mehr Ally v. Shakerkhanoobai* (1905) 7 Bom. L R 602; *Hussaini Begum v. Muhammad* (1907) 29 All. 222; *Hamid Khan v. Kubra Begum* (1918) 40 All. 322; 441 C 728; *Genu Meah v. Begummah Bibi* A I R 1933 Rang. 322; *Sofia Begum v. Zaheer Hassan* (1927) All. L J 157; 230 C 239; A I R 1947 All. 16.

¹³ *Mst. Sofia Begum v. Syed Zaheer Hasan Rizvi*, A I R (1947) All. 16,

Non-payment of Prompt Dower : If the husband has not paid prompt dower, a wife can refuse to live with her husband though there has been consummation. (*Rahim Jan v. Muhammad* PLD 1955 Lah. 122). If the suit for restitution of conjugal is brought after consummation and the non-payment of prompt dower is raised as defence, then a decree conditional on payment of prompt dower should be passed.¹⁴ It is now a settled law.

If a wife makes a demand for her prompt dower and it is not paid by the husband, he would not be given a decree for restitution of conjugal rights. (PLD 1959 Lah. 710; 1969 DLC 143). The wife can resist the suit on this ground even when the marriage has been consummated. (1969 DLC 143=21 DLR 357). Where the Court passes a decree for restitution of conjugal rights in spite of non-payment of prompt dower, the condition of the prior payment of dower debt should be imposed on the decree for restitution of conjugal rights. (1969 DLC 143=21 DLR 357).

False Charge of Adultery : If the husband has brought a false charge of adultery, the restitution of conjugal rights can not be decreed.¹⁵ A false charge of adultery by the husband against the wife would be a good ground for refusing a decree for restitution of conjugal rights. (2 Luck, 482; 101 I. C. 261; 1865, 3 W. R. 93). But if the husband bonafide retracts the charge of adultery brought against the wife earlier, a decree for restitution of conjugal rights can be given. (PLD 1952 Dacca 179). But if the charge of adultery was true, it was no ground for refusing a decree for restitution of conjugal rights because in that case the refusal to grant the decree would amount to putting a high premium on immorality. (54 Cal. 363=AIR 1927 Cal. 579).

Reprehensible Conduct : When the husband is guilty of any reprehensible conduct, as for instance, when the real object in suing for the restitution of conjugal rights is to covet his wife's property,¹⁶ actual violence, infringing the right to the safety of life, limb and health, or reasonable apprehension of such violence would be a good defence.¹⁷ Charges of immorality and adultery, and the heaping of insults also constitute cruelty.¹⁸

¹⁴*Amir Begum v. Malik Wali Khan* A I R 1933 All. 634.

¹⁵*Maqboolan v. Ramzan* (1927) 2 Luck. 482; 101 C 261; A I R 1927 Oudh 154. *Janu Beebee v. Deparee* (1865) 3 W R 93. *Jamirud-Din v. Sahera* (1927) 54 Cal. 363; 101 I C 60; A I R 1927 Cal. 579.

¹⁶*Khurshid Begum v. Abdul Rashid* 100 I C 169; A I R 1927 Nag 139.

¹⁷*Asha Bibi v. Kadir Ibrahim* (1909) 33 Mad. 22, 25.

¹⁸*Husaini Begum v. Muhammad Rustam Ali Khan* (1906) 29 All. 222, 227.

The dictum of the Privy Council that "The Muhammadan Law on a question of what is legal cruelty between man and wife would probably not differ materially from our own....." has been liberally construed by our Courts, and the decree for restitution of conjugal rights is not permitted to be made an engine of cruelty. Similarly, where the marriage is irregular, or the marriage has been avoided by the lawful exercise of an option, or where the husband has been made an outcaste by his community (Jama'at) the relief of restitution is refused. Where there is gross failure on the part of the husband to perform the obligations which the marriage contract impose upon him for the benefit of the wife, the Court will be justified in refusing assistance to the husband in a suit for restitution of conjugal rights. (PLD 1967 Lah. 1104; A I R 1960 Patna 293). Thus the bad conduct or gross neglect of the wife by the husband is a good defence to a suit brought by him for restitution of conjugal rights. Where the husband has failed to provide any maintenance for the defendant wife and her daughter and she was compelled to go to the Criminal Court to enforce the husband's obligation to maintain her under section 488, Cr. P. C., the husband is guilty of gross failure on his part to perform the obligations imposed on him by the agreement and these circumstances afford a sufficient ground to refuse to the husband any relief in his suit. (PLD 1967 Lah. 1104). Where the Court found that the husband never really cared for his first wife and filed his suit for restitution only to defeat her application for maintenance, it was held that the suit was malafide and should be dismissed. (AIR 1960 All. 684).

Option of puberty : When the marriage had taken place during her minority and wife had repudiated it on attaining puberty the husband cannot ask for restitution of conjugal rights. (146 I. C. 292; 59 Bom. 426; 157 I. C. 694).

Irregular marriage : Irregularity of the marriage is a good defence to a suit for restitution of conjugal rights as it is necessary for a marriage to be valid according to Muslim Personal Law before the courts can grant a decree for restitution of conjugal rights. (PLD 1959 Lah. 1014). It is a good defence even when consummation has taken place. (AIR 1934 Lah. 907; 154 I. C. 677). A decree for restitution of conjugal rights cannot be granted if the marriage though consummated was irregular one having been performed during 'iddat.¹⁹

Plurality of wives and unequal treatment : In a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second wife, if the Court after a review of the evidence feels

¹⁹Mst. Bakht Bibi v. Qaim Din A I R 1934 Lah. 907.

that the circumstances reveal that in taking a second wife the husband has been guilty of such conduct] as to make it inequitable for the Court to compel the first wife to live with him, it will refuse him relief by way of restitution. The onus would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first. But in the absence of a cogent explanation the Court will presume, under modern conditions, that the action of the husband in taking a second wife involved cruelty to the first and that it would be inequitable for the Court to compel her against her wishes to live with such a husband. (AIR 1960 Allahabad 684).

When the husband has two wives it is for him to prove that he is treating them on equal footing. If he fails to do so, he is not entitled to the discretion being exercised in his favour in a case of restitution of conjugal rights. (PLD 1959 Lah. 710).

Modern Legislation—Pakistan :

In Pakistan by an amendment in the Dissolution of Muslim Marriages Act, 1939, brought in by the Muslim Family Laws Ordinance, 1961, plurality of wives has been included as one of the grounds for dissolution of marriage if the husband does not treat her (the wife complaining) equitably in accordance with the injunctions of the Qur'an, on proving the unequal or oppressive treatment on the part of the husband. As such to resist the husband's suit for restitution of conjugal rights by the wife this ground will also suffice. The second marriage ipso facto does not furnish a ground for refusal to restitution of conjugal rights, unless it is accompanied by some such allegations of inequitable treatment which go to prove that a happy union between the spouses cannot be maintained.

Section 94. An agreement with reasonable terms arrived at between the spouses, either at the time of marriage or subsequent thereto, whereby the wife is permitted to have residence of her choice, shall be enforceable by the Court.

COMMENTARY

Generally speaking, Muslim jurists are not favourably inclined to allow absolute freedom in the matter of conditions in a contract of marriage, yet it is approved by the courts of Indo-Pakistan sub-continent that reasonable conditions regarding the wife's right of residing where she pleases may be settled by the parties and such stipulations may be enforced through courts of law.

Every case in which the question of conjugal domicile is involved, depends upon its own special features, the general principle of the Muslim Law on the subject being the same as in other system of law, viz., that the wife is bound to reside with her husband, unless there is any valid reason to justify her refusal to do so. The sufficiency or validity of the reason is a matter for the consideration of the Court, with special regard to the place or country in which they reside.²⁰ The husband may also insist upon his wife accompanying him from one place to another, if the change is occasioned by the requirements of his duty.

Stipulations entered into at the time of marriage : In the absence of any conduct on the husband's part justifying an apprehension that if the wife accompanied him to the place chosen by him for his residence she would be at his mercy and exposed to his violence, she is bound by law to accompany him wherever he goes. At the same time, the law recognises the validity of express stipulations entered into at the time of marriage, respecting the conjugal residence. If it be agreed that the husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own. Such stipulation, in order to be practically carried into effect, must be *express* or entered in the deed of marriage, if any; a mere verbal understanding is not regarded as sufficient proof.

If the wife, however, were once to consent to leave the place of residence agreed upon at the time of marriage, she would be presumed to have waived the right acquired under the express stipulation, and to have adopted the domicile chosen by the husband. If a special place be indicated in the deed of marriage as the place where the husband should allow the wife to live, and it appears subsequently that it is not suited for the abode of a respectable woman, or that some injury was likely to accrue to the wife if she were to remain there, or that the wife's parents were not of good character the husband may compel the wife to remove from such place or from the house of such parents.

Enforcement of Agreements : A Muslim wife is entitled at the time of marriage, or subsequent thereto, to make a contract with her husband. Such a contract, if it is lawful and not opposed to the policy of law, will be enforced by the Courts. A contract may lay down the terms upon which marital life is to be regulated. It may also provide for the dissolution of the marriage by the wife, without the intervention of the Court. Syed Amīr 'Alī holds that the following stipulations would be enforceable at law: (i) That the husband shall not contract a second marriage during the existence

²⁰*Bai Jina v. Kharwa Jina* (1907) I L 31 Bom. 366.

or continuance of the first. (ii) That the husband shall not remove the wife from the conjugal domicile without her consent. (iii) That the husband shall not absent himself from the conjugal domicile beyond a certain specified time. (iv) That the husband and the wife shall live in a specified place. (v) That a certain portion of the dower shall be paid at once or within a stated period, and the remainder on the dissolution of the marriage by death or divorce. (vi) That the husband shall pay the wife a fixed maintenance. (vii) That he shall maintain the children of the wife by a former husband. (viii) That he shall not prevent her from receiving visits of her relations whenever she likes.²¹

The commonest conditions relate to (i) the place of residence, (ii) the payment of periodical sums of money to the wife, and (iii) the restriction of the husband's right to marry a second wife. So far as residence is concerned, reasonable conditions regarding the wife's right of residing where she pleases may be enforced; but an agreement that the wife shall be at liberty to live permanently with her parents has been held to be void. Later, it has been held that where a man marries a second wife and stipulates that the second wife shall be at liberty to live at her parent's house and that, in case of disagreement, a sum of Rs. 30 per month should be payable to her at her parental home, the Court upheld both these conditions.²²

Thus, as the husband has the right in general to control the actions of the wife, the wife can make reasonable stipulations safeguarding her right to stay freely where she likes. But if the agreement provides that the wife shall have the absolute and unqualified right to reside permanently with her parents, the Courts will hesitate to enforce such a stipulation as it would create moral, social and legal difficulties. For instance, it would be difficult for the husband to exercise control over the wife's actions; consortium would not always be easy; the question of separate maintenance would arise; the guardianship of children would raise thorny problems; the adjustment of mutual rights and obligations would be difficult. As the husband, however, has preponderant authority in matters matrimonial, the Courts, within reasonable limits, tend to lean in favour of the wife. Where some reason exists for supporting it, the Courts would readily enforce an agreement which has been freely entered into by the parties. Thus a second wife or a first wife when the husband remarries, may enforce the agreement to reside at her parents' home, and may even obtain maintenance, for such a condition could hardly be considered unreasonable.

Shi'ī View ; Under the Shite law, a stipulation that the husband shall not take away his wife from her own city is binding. Thus, if a man

²¹Amir Ali; Muhammadan Law; Lahore, 1965, p. 381.

²²*Mst. Sakina v. Shamshad Khan*, A I R 1936 Pesh. 195.

marries a woman on the express condition that she should be permitted to reside amongst her own people or in a specified country, such a condition is lawful, for every condition is enforceable, unless it legalizes what is forbidden, or forbids what is permissible.

Indo-Pakistan Law :

There has been a considerable development in Indo-Pak. sub-continent, in the position of law on the subject relating to stipulations in a marriage contract. As far back as 1905, Batchelor J., of the Bombay High Court, while sitting singly in *Meherally v. Sakerkhānnobai* (1905) 7 Bom. L.R. 602 held that an *ante-nuptial* agreement giving choice to the wife to live with her parents after marriage being *ab initio* void was no answer to husband's suit for restitution of conjugal rights. In a latter Bombay case too, *Musammat Bi Fatima v. Ali Muhammad Aiyeb*, (ILR 37 Bom. 280) Batchelor J., who delivered the judgment of the Division Bench, relied on his earlier judgment, and it was held by him that an agreement made by a husband with his wife was bad in English law and was as such bad between Muhammadan spouses. The learned Judge concluded his judgment with the following observation:—

“It is, as I understand it, as much the policy of the Muhammadan Law as of the English law, that people who are married should live together and not apart; and if that is so, it seems to me that there should be no difficulty in applying to Muhammadans the English Rule that any agreement such as this, which provides and therefore encourages, future separation between the spouses, must be pronounced void as being against, public policy.”

A Division Bench of the Lahore High Court in a case, *Musammat Bibi Fatima v. Nur Muhammad* (1921) (60 I. C. 88), relied on the judgment of the Bombay High Court and held that an agreement by a Muslim husband with his wife that she will live in her parents' house was invalid and cannot be utilized by wife to defeat the husband's claim for the restitution of conjugal right. The agreement between husband and wife to live away from each other was held to be void as being against the public policy.

The Bombay case came up for examination before the Chief Court of Oudh in *Manzoor v. Azizul*, (AIR 1928 Oudh 303). In that case, the wife was the first wife of the plaintiff husband and when both the wives could not pull on well an agreement was executed by the husband for the payment of maintenance in a separate house. On a suit by the wife for the maintenance the husband pleaded that he was not liable to maintain her under the agreement, because she was not living with him as a wife. It was urged before the Chief Court that the agreement was without consideration and

against public policy. The learned judges repelled the contention and dissenting from the Bombay view, observed as follows:—

“If a Muhammadan marries a second wife and finds that his first wife can not pull on well with his second wife and he does not and cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of the family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and his second wife, that agreement is not in our opinion against public policy. This agreement does not necessarily result in separation between husband and wife.”

The Lahore High Court in a latter decision, *Muhammad Ali Akbar v. Mst. Fatima Begum* (AIR 1929 Lah. 660) considered the judgment of the Bombay High Court in a case where the District Judge had made an award of Rs. 900/- in favour of wife on account of the arrears of *Kharcha-i-Pūdōn*. It seems that their earlier decision of *Mst. Bibi Fatima v. Nur Muhammad* was not cited, but the Bombay case was particularly dissented in the following words:—

“With all due deference to the learned judges (of Bombay High Court) who decided that case, I do not see why a stipulation by the husband to make an allowance to his wife in case of separation should be deemed to offend against the rule of public policy. Such a stipulation encourages their living separate from each other no more than their living together by imposing an obligation on the husband calculated to prevent him from doing any act which would lead to separation.”

Their Lordships of the Privy Council in *Nawab Khawaja Muhammad Khan v. Husaini Begum alias Dilbari Begum* (7 I. C. 237) where it was held that:—

“Where the father of the husband by an agreement executed to the father of the wife bound himself to pay to the wife the fixed allowance and there was no condition that it should be paid only whilst the wife is living in the husband's home, the wife would be entitled to the allowance even if she refused to live with her husband.”

The attention of learned Judges who decided the Bombay case in 1912 and the Lahore case in 1920, does not seem to have been drawn to the above-mentioned pronouncement of their Lordships of the Privy Council.

The other cases which can be referred here in this context are *Saeed Khan v. Balatunnisa Bibi* (25 C WN 888) where in a suit instituted by the husband for the restitution of the conjugal rights it was held by a Division Bench that a stipulation that a Muhammadan wife may leave her husband's

house on ill-treatment is not opposed to Muhammadan Law. In this case the husband was given a conditional decree to go and perform his marital obligation in the house of his wife's parents. It was clearly laid down in this case that there is nothing in the Muslim Law which can invalidate the agreement of the husband with the wife that wife can live away from the husband in case of disagreement.

The High Court of Peshawar, in the case of *Mst. Sakina Farooq v. Shamshad Khan* (AIR 1936 Pesh. 195) in similar circumstances also held that a Muslim husband could make a stipulation that he will not remove his wife from her parental home and that such an agreement is a valid contract and not opposed to public policy.

Recently, the High Court of West Pakistan, Lahore Bench, in the case of *Muhammad Zaman v. Mst. Irshad Begum* and others, after stating the case-law on the subject, came to the following conclusion :

“No doubt it is the duty of the wife to follow the husband wherever he desires her to go. But such an obligation of the wife to live with her husband at all times and in all circumstances is not an absolute one. The law recognizes circumstances which justify her refusal to live with him.”

Conclusion :

The upshot of the above discussion is that a wife, at the time of marriage or subsequent thereto, may enter into an agreement with her husband to the effect that, on the happening of certain contingencies, she would be entitled to remove herself from the conjugal residence of the husband, provided the conditions laid down in the said agreement are reasonable and not opposed to the public policy, as enshrined in the *Shari'ah*. In a proper case, the Court may grant a conditional decree to the husband for performing marital obligations at the wife's residence.

Conditions in Agreements : In principle, the Muslim Law allows liberty to the spouses to settle such terms as they like relating to their marriage. The Courts, however, considered that if the conditions are opposed to public policy or are unreasonable then they cannot be given effect to and the agreement containing them would be unenforceable. The present tendency of the Courts has been to give more and more latitude to the spouses to settle the terms for governing their future marital relations and they have given effect to the conditions freely agreed upon between the parties as far as possible. (*Muhammad Zaman vs. Irshad Begum*, P.L.D. 1967, Lah. 1104).

When the conditions agreed upon are contained in a marriage agreement or Nikah Namah, as it is called, then its terms or conditions are to be

looked at and construed in the same way as the terms of any other contract. (*Ahmad Kassim Molla vs. Khatun Bibi*, A. I. R. 1933 Cal. 27). When an agreement consists of two parts one of which is invalid and the other is valid and the two are separable then the stipulation contained in the portion which is valid can be enforced. But if they are inseparable then the agreement cannot be enforced. (Section 57, Contract Act; *Mehar Ali Mooraj vs. Saker Khatoon Bai*, 7 B. L. R. 602).

Reasonable Conditions : No hard and fast rule can be laid down to determine what are reasonable condition and what conditions are unreasonable. Some agreements in which the wife is given the power to live separately from her husband under certain conditions such as maltreatment of the wife by the husband have been considered valid and enforceable. (*Bunney Sahib vs. Abeda Begum*, A. I. R. 1922, Oudh. 251; *Mst. Sakina Faruq vs. Shamshad Khan*, A. I. R. 1936, Pesh. 195). Thus agreement providing for payment of maintenance to the wife at her parents' house or when living separate from her husband in case of disagreement, have been held to be valid. (*Syed Abbas Ali vs. Najmun Nissa Begum*, 43, C. W. N. 1059; *Buffatan Bibi vs. Sheikh Abdul Salam*, A. I. R. 1950, Cal. 304; *Mst. Hamidan vs. Muhammad Umar*, A. I. R. 1932, Lah. 65; *Muhammad Moinuddin vs. Jamal Fatima*, A. I. R. 1921, All. 192). It has been held by the Lahore High Court that an agreement which allows the wife the right to live separate from her husband in case of disagreement or on his taking a second wife is not within the meaning of Section 23 of the Contract Act. (*Muhammad Zaman vs. Irshad Begum*, P. L. D. 1967, Lah. 1104).

Valid Conditions: Muslim justists have inter alia held the following conditions attached to a marriage contract to be valid. They are deducible from the statements made by the jurists as compiled in *Fatawa Alamgiriyya*, vol. ii, pp. 41, 73, 74, 75, 83-87, 144 and 148:—

1. That the husband shall not absent himself from their place of residence for a specified period of time.
2. That the wife cannot be forced to prepare food or wash clothes.
3. That the husband shall not keep the wife in the same house with his other wife. The wife can lawfully refuse to live with another wife of the husband.
4. That the husband shall not stop the wife from going to her parents once a week and to other near relations once a month.
5. That the husband shall not indulge in gambling.
6. That the husband shall not drink liquor.
7. That the husband shall not maltreat the wife.

8. That the husband shall not use filthy language to the wife.
9. That the husband shall pay the wife maintenance every month by a specified date or give her a specified sum of money by a certain date.
10. That the husband shall not leave the place they are living in without the wife's permission.
11. That the husband shall not be guilty of immorality.

Invalid Conditions : The following conditions have been held by the Courts to be unreasonable or opposed to public policy and so invalid :—

- (i) The condition that made the wife absolutely free to separate herself from her husband without any reason. (*Mehr Ali Mooraj vs. Saker Khanoo Bai*, 7 B. L. R. 602; *Banney Sahib vs. Abeda Begum*, A. I. R. 1922, Oudh 251).
- (ii) The condition that the wife would be entitled to maintenance during a specified period when the wife is to thank herself for the non-maintenance by the husband. (*Ahmed Ali vs. Sabha Khatoon*, P.L.D. 1952, Dacca 385). A case of similar nature came up for decision before a Division Bench of the Calcutta High Court and the learned judges, however, gave effect to the agreement. (*Bafatan Bibi vs. Shaikh Abdus Salam*, A. I. R. 1950, Cal. 304).
- (iii) The condition that the husband should live permanently with the parents of the wife and on his failure to do so, the wife would be entitled to divorce herself. (*Imam Ali Patwari vs. Arfatun Nessa*; 21 I. C. 87, A. I. R. 1914, Cal. 369; *Khatun Bibi vs. Rajjab*, A. I. R. 1926, All. 615, 94, I. C. 224; *Hameedan Nessa Bibi vs. Zahiruddin Sheikh* (1890), 17, Cal. 670). If in spite of such an agreement she leaves her parents' house to live with her husband in his house then she will be taken to have waived her right, if any, under the agreement. (*Fatima Bibi vs. Noor Muhammad*, (1920) 1 Lah. 597; 60 I. C. 88).

Public Policy :

It is difficult to lay down exactly as to what conditions are opposed to public policy. The Lahore High Court has followed an English case in which it was held that "Public Policy" is always an unsafe and a treacherous ground for legal decisions and must, therefore, be kept within its reasonable limits. [*Muhammad Ali Akbar v. Fatima Begum*, A. I. R. 1929, Lah. 660 : *Driefountain v. Consolidated Mines Ltd.*, (1902), A. C. 484; 87 L. T. 372). Besides, public policy under the Muslim law differs from the present

notion of public policy. It was stated in a recent case that the term "Public Policy" is very broad and it is not safe to rely upon it in matrimonial cases as a ground for legal decision. (*Muhammad Zaman v. Irshad Begum*, P. L. D. 1967, Lah. 1104). It was a case of restraint on Marriage.

Pakistan Law : A Muslim husband executed an agreement in favour of his wife to the effect that in case he was to take a second wife she will be entitled to receive maintenance in a separate house and even if she wanted to live with her parents he will be liable to pay maintenance to her in her parental home. The husband contracted a second marriage and consequently the wife resided separately and claimed maintenance. The husband thereupon filed a suit for restitution of conjugal rights. The suit was dismissed by lower Courts. In second appeal before the High Court it was contended that even if the agreement executed by the husband was valid there was nothing under the law to prevent a husband from getting a decree for restitution of conjugal rights in his suit because at the most the wife can enforce her maintenance through a Court of law but the existence of such an agreement is no defence to the husband's suit for restitution of conjugal rights against his wife. It was held that no doubt a husband can maintain a suit for the restitution of conjugal rights in a civil Court against his wife, but the decree for restitution of conjugal rights is in the discretion of the Court whose duty it is to find out if there be a cruelty of a degree rendering it unsafe for her if she is ordered return to the husband's house. Every case, in which the question of conjugal domicile is involved, depends upon its own features and the general principles of the Muslim Law on the subject are that a wife is bound to reside with her husband unless there is a valid reason of her refusal to do so. The sufficiency or validity of the reason in each case is a matter for the consideration of the Court with special reference to the circumstances in which the parties have been residing or they wish to settle in future. It is true that it is the duty of the wife to follow the husband wherever he desires her to go. But such an obligation of the wife to live with her husband at all times and in all circumstances is not an absolute one. The law recognises circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, etc., or he has directed her to leave his house or even connived at her doing so. On all such occasions the husband cannot require his wife to re-enter the conjugal domicile nor the Court of justice can give him assistance to restore him the hand of his wife. The bad conduct or gross neglect of the husband under the Muslim Law is good defence to a suit brought by him for restitution of conjugal rights. Where the husband has failed to provide any maintenance for the defendant wife and her daughter and she was compelled to go to the Criminal Court to enforce the husband's obligation of maintenance

under section 488, Cr. P.C., in such circumstances, the husband is guilty of gross failure on his part to perform his obligations imposed on him by the agreement and these circumstances afford a sufficient ground to refuse to the husband any relief in his suit.²³

Section 95. Where the party against whom a decree for
 Execution of
 decree restitution of conjugal rights has been passed,
 has had an opportunity of obeying the decree
 but has wilfully failed to obey it, the decree may be enforced
 by the detention in Civil prison, or by the attachment of pro-
 perty of such defaulting party or by both; provided that if the
 said party is restrained by the parents, relations or other
 persons from performing the decree, the Court shall issue an
 injunction order restraining such persons therefrom, and the
 decree for restitution of conjugal rights will be enforced.

COMMENTARY

The Courts in Pakistan refuse to execute the decrees for restitution of conjugal rights as no such power has been conferred on them (See Order XXI R 32 CPC). The question may arise, if the Court is unable to execute its decree, where lies the necessity of granting it? The decree may however, justify the husband's other actions, such as taking another wife and non-liability to maintain the wife.

Section 96. In case the defaulting party, inspite of the enforce-
 Wife's persistent
 refusal to obey
 the decree. ment of the order of attachment of property or
 imprisonment or both, persists in refusal to
 comply with the decree, the court may dissolve the marriage
 on such terms as it considers necessary.

COMMENTARY

If the wife inspite of decree of restitution of conjugal rights having been passed against her refuses to live with her husband and even on being imprisoned or her property being attached persists in her refusal, and all attempts of reconciliation fail, the Court shall dissolve the marriage on such conditions as it deems fit and proper in the circumstances of the case by invoking the provisions of *Khul'a*. The same rule will apply in

²³*Muhammad Zamān v. Irshad Begum*, P L D 1967 Lah. 1104. [I L R 37 Bom. 280 and (1921) 60 I. C. 88 dissented]. Also see *Muhammad Yasin v. Khushnuma Khatoon*, Karachi Weekly Reports, Karachi, Vol. ii, 1961, p. 29.

case of husband who abstains from resuming his marital obligations, inspite of Court's decree. In such situation the Court will order the husband to pronounce divorce and upon his refusal or failure, the Court will be empowered to dissolve the marriage.

Section 97. A husband is entitled to sue for damages any Enticement of wife person, who has enticed away his wife and has deprived him of her consortium. The wife, however, cannot be sued.

COMMENTARY

A Muslim husband can maintain a suit for damages against a person who persuades and entices away his wife to live apart from him as he has been deprived of domestic comforts. The same rule applies against taking away one's wife by force.

CHAPTER—XI

DIVORCE : Definition, Kinds, Capacity and Evidence

Section 97. Divorce is the snapping off the *nuptial* tie, with
Definition of express or implied words, by the husband per-
Divorce sonally or through agent or delegate making
it effective instantaneously or consequentially.

COMMENTARY

The literal meaning of the word *ṭalāq* is to snap off or to separate. Imām Sarakhsī¹ has given its literal meaning as “*izalatul qayd*”, freedom from bondage. Its root is *ṭalqun*, from which the word *iṭlāq* meaning freedom has been derived.

Ṭalāq (divorce) in Shari‘ah means terminating with explicit or implied words the bond created by marriage contract. In irrevocable divorce the marriage contract is dissolved instantly, whereas in revocable divorce the marriage contract does not dissolve till the period of probation (*‘iddat*) is not over; it only weakens.

Definition of Divorce in Hanafi Fiqh :

Ibn Humām in his famous book, *Fath al-Qadīr* calls divorce an act of terminating the bond created by marriage contract by express or implied words or by any other means, for instance, by *Qāḍi*’s decree.² It is said in

¹ *Al-Sarakhsī* : Imām Shams al-Dīn (d. 482 A.H.) : *Al-Mabsūt*, Cairo, 1924 A.H. vol. vi, p. 2.

² Ibn Humām : Kamal al-Dīn (d. 861 A.H.) : *Fath al-Qadīr*, Cairo, 1356 A.H. vol. iii, p. 21 :

“وفى الشرع رفع قيد النكاح بلفظ مخصوص او بكناية وغيرهما كقول القاضي”

It may not perhaps be improper to add here that the bondage of marriage which gets snapped by the order of Qadi is sometimes a form of dissolution of marriage and not divorce.

*Al-Lubāb*³ and *Bahr al-Rā'iq*⁴ that terminating instantly or consequentially the bond of marriage contract by explicit words is called "divorce". Divorce is described in *Al-Durr al-Mukhtār*⁵ as the act of terminating with explicit words instantaneously through irrevocable divorce or consequentially through revocable divorce, the bond created by marriage contract. Divorce has been defined in *Kanz al-Daqa'iq*⁶ and *Multaqa' al Abhur*⁷ and *Sharh Majma' al Bahrayn*⁸ as *Raf' al-Qayd thābit bil-Nikah*; that is, divorce is interpreted as freedom gained from the bond of marriage contract established by law.⁹

Definition of Divorce in other Schools of Fiqh :

The above definitions of divorce are as laid down in Ḥanafī books of *fiqh*. Definitions of divorce are also to be found in the books of other schools of *fiqh*. These definitions of divorce in books of *fiqh* of other schools somewhat differ from the definitions given in books of Ḥanafī *fiqh*. Though legally correct, they are not so comprehensive as to encompass all the elements or ingredients contained in the definition of divorce. This is evident from the definitions noted below in the footnote.¹⁰

³Al-Mīdānī 'Abdul Ḡhanī: *Al-Lubāb*, commentary of Al-Qudūrī's *Al-Mukhtasar*, Cairo, 1383 A.H. vol. iii, p. 37.

”رفع قيد النكاح في الحال او المال بلفظ مخصوص“

⁴Ibn Nujaym (d. 970 A. H.) : *Al-Bahr al-Rā'iq*, Cairo, 1311 A. H. vol. iii, p. 252 :

”فالحمد الصحيح قولنا رفع قيد النكاح حالا او مالا بلفظ مخصوص“

⁵Al-Ḥaṣkafī, 'Ala al Dīn (d. 1088 A.H.) : *Al-Durr al-Mukhtār*, o. m. o. *Radd al-Muhtār*. Cairo, 1252 A.H. vol. ii, p. 426 :

”وشرعاً رفع قيد النكاح في الحال بالبائن او المال بالرجعي بلفظ مخصوص“

⁶Al-Nasafī, Maḥmūd (d. 710 A. H.), *Kanz ul-Daqa'iq*, Delhi, 1338 A.H. p. 114.

⁷Al-Halbi, Ibrahim b. Muḥammad (d. 956 A.H.) : *Multaqa' al-Abhur* o. m. o. *Majma' al-Anhur*, Cairo, 1327 A.H. vol. i, p. 381.

⁸Ibn al-Sa'āti, Ahmad, b. 'Ali (d. 694 A.H.) *Majma' al-Bahrayn*, Delhi 1899 A.D. p. 2:

”رفع القيد الثابت بالنكاح“

⁹The 'bondage of marriage' means the dictates of Sharī'ah which are applicable to the parties (contracting marriage, as husband and wife) e.g., husbands' right of retention of his wife, wives' right of claiming maintenance from her husband.

¹⁰*Al-Malikiyyah*—Al-Maghribi, Muḥammad b. Abdul Rahmān (d. 954 A.H.) : *Muwahib al-Jalīl*, Cairo, 1329 A.H. vol. iv, p. 18 :

”الطلاق : صفة حكمية ترفع حلية متعة الزوج بزوجه“

Analysis :

Generally speaking, the definitions that have been given in the several books of *fiqh* cannot be called comprehensive. All the definitions given in the footnote are brief and insufficient. Likewise the definitions given in the last mentioned three *Ḥanafī* books are inchoate, in as much as the divorce that has been defined in these three books does not cover the consequential revocable divorce in which the bond of marriage contract snaps after the expiry of the period of probation. Moreover, all these latter definitions do also cover the cases of separations effected on the grounds of option of puberty, non-maintenance or apostasy, which in fact are to be categorised as the cancellation or dissolution of marriage contract. However, in case of cancellation of marriage contract too the marriage bond snaps. Likewise in defining divorce the words concerning the termination of bond of marriage contract must be categorised as either by express¹¹ or implied¹² words and further qualified as instantaneous or consequential. This is necessary in as much as in case of irrevocable divorce the marriage contract ends instantaneously, whereas in case of revocable divorce the marriage contract ends after the expiry of the period of probation.

Modern Legislation Definitions :

The definitions referred to above are all in accordance with classical view. In modern times the concept of the irrevocability of divorce, except in certain cases, has been given a go-by.

Al-Shafiyyah—Al-Khatīb Muhammad al-Sharbīnī (d. 977 A.H.) *Mughni al-Muhtaj*, Cairo, 1933 vol. iii, p. 279 :

”حل عقده النكاح بلفظ الطلاق ونحوه“

Al-Hanbaliyyah—Al-Maqdisi, Sharf al-Din (d. 968 A.H.) *Al-Iqna'*, vol. iv, p. 2 :

”الطلاق : هو حل قيد لنكاح او بعضه“

Al-Imamiyyah—*Jawahar al-Kalam*, Iran, vol. v p. 271:

”الطلاق : ازالة قيد النكاح بصيغة طالق وشبهها“

Al-Zaydiyyah—Abdulla b. Maftah (d. 877 A.H.) : *Muntazi' al-Mukhtār*, Cairo, 1332 A.H. vol. ii, p. 381 :

”الطلاق : قول مخصوص او وافى معناه يرتفع به النكاح او ينشلم“

¹¹“Express Words” mean the words explicit for divorce. e.g. “I divorce the.”

¹²“Implied words” mean that the words are not explicit for divorce but circumstance be such that the words may imply divorce, provided divorce has been intended by those words, e.g. “You are prohibited to me, or “Count thy period.”

Morocco :

Art. 44. Divorce means dissolution of marriage by repudiation by the husband or by his agent or by a person having an authority delegated by the husband, or by the wife having option to do so, or effected by the Qādi under a decree of dissolution of marriage.

Iraq :

Art. 34. Divorce lifts the bond of marriage when pronounced by the husband or his agent, or by the wife (being the agent therefor; or having been delegated authority therefor) or by the Qāḍī.

Analysis :

The several definitions of divorce, as are given in the family laws currently in force in different Muslim countries, can hardly be said to be exhaustive. Indeed the definitions as are given in the family laws in force in Iraq and Morocco are comparatively more comprehensive than the definition given in that of Tunisia.¹³ In Pakistan Family Laws Ordinance, 1961, no definition of divorce has been given.

Conclusion :

After a careful study of the above noted definitions, the present writer has come to the conclusion that among the different definitions that are given in the above books, the definitions given by Ibn al-Humām, Ibn al-Nujaym and 'Alā al-Dīn Ḥaskafī are more comprehensive than the definitions given by other jurists and they, to a great extent, encompass the meaning of 'divorce'. The present writer has, however, tried to give an exhaustive definition of divorce, in the section framed above.

Section 98. (A) Divorce as regards its attributes is of two Kinds of Divorce kinds :—

- (1) *Ṭalāq al-Sunnat* or *Masnūn* (Divorce according to the rules laid down in traditions of the prophet);

¹³*Qanūn al-Aḥwāl al-Shakhsiyyah*, No. 88 of 1959, Iraq, Sec. 34:

”الطلاق رفع قيد الزواج بإيقاع من الزوج أو وكيله أو من الزوجة إن وكلت به ، أو فوضت ، أو من القاضي“

Mujalla al-Aḥwāl al-Shakhsiyyah, Tunisia, Sec. 29.

”الطلاق هو حل عقدة الزوج“

Mudawwana al-Aḥwāl al-Shakhsiyyah, Morocco, Sec. 34 :

”الطلاق هو حل عقدة النكاح بإيقاع الزوج أو وكيله أو من فوض له في ذلك أو الزوجة إن ملكت هذا الحق والقاضي“

(2) *Talāq al-Bid'at* or *Ghayr Masnūn* (Innovated Divorce, divorce not according to the rules laid down in traditions of the prophet).

(B) Divorce as regards its effects is of three kinds :—

(1) Revocable divorce.

(2) Irrevocable divorce of minor degree (*Talaq Bā'in*).

(3) Irrevocable divorce of major degree (*Talaq Ba'in kubrā* or *Mughallizah*).

COMMENTARY

Divorce as regards its attributes :—

(A) 1. *Talaq Al-Sunnat* :

'Divorce according to the rules of tradition' (*Talāq al-Sunnat*) is that divorce which is pronounced in the manner and in the time-frame prescribed by the Holy Prophet, Pronouncing such a divorce, however, does not mean that it is an act of piety that it shall entitle one to the reward of a virtuous act. Divorce in itself is not an act of devotion that reward of a virtuous act may be expected out of it.¹⁴ *Talāq al-Sunnat* only means that a divorce pronounced by that procedure has the approval of the Holy Prophet and his Companions and the pronouncing of divorce contrary to that manner is procedurally disapproved and is sinful.

Kinds of Talāq al-Sunnat : According to Ḥanafīs there are two modes of pronouncing *ṭalāq al-Sunnat*, which is of two kinds :¹⁵

(a) *Talāq al-Aḥsan* (Most approved form of divorce).

(b) *Talāq al-Ḥasan* (Proper form of divorce).

(a) *Talaq Al-Ahsan* (Most Approved Form of Divorce) :

Ṭalāq al-Ahsan is the first kind of *ṭalāq* completed by efflux of prescribed time. In the case of this *ṭalāq*, one single revocable divorce is pronounced by a husband who has consummated the marriage, during the period in which the wife is free of menstruation and in which she has not been cohabited with leaving her to complete her '*iddat* of the prescribed period of time unless she is pregnant in which case she is delivered of the child.¹⁶

¹⁴Ibn Nujaym : op. cit. p. 256.

¹⁵Al-Kasānī, Imam 'Ala al-Dīn (d. 587 A.H.); *Badai' al-Ṣanai'*, Cairo, 1328 A.H. vol. iii, pp. 88-89.

¹⁶Ibid.

Ṭalāq al-Aḥsan is based on the narrative of Ibrāhīm Nakh'ī that the companions of the holy Prophet approved of the divorce which was pronounced once to the wife, thereafter she was left also till she completed three periods of her menstruation, if she menstruates otherwise three months.¹⁷

Imām Muḥammad has laid down in his book *Muwatṭā'* that *Ṭalāq al-Sunnat* is that which the husband pronounces to his wife, keeping in view the period of her probation, in the state of her purity, without having sexual intercourse with her in that state of her purity, which she attains after her menstruation. That is the formulation of Imām Abū Ḥanīfah and of Ḥanafī jurists in general.¹⁸

(b) Talaq Al-Hasan : (Proper Divorce) :

Ṭalāq al-Ḥasan is the second approved form of divorce by a husband who has consummated the marriage pronounces one divorce during each three successive periods in which the wife, free of menstruation, has not been cohabited with.¹⁹ There is no disagreement about *Ṭalāq al-Ahsan* being a divorce in accordance with the rules laid down in the tradition of the Prophet. There is, however, disagreement whether *Ṭalāq al-Hasan* is in accordance with the rules laid down in the tradition of the Prophet. The Ḥanafīs base their formulation on the verse of the Qur'ān, فطلقوهن لعدتهن i.e. "that you divorce them at their term of probation²⁰." That is, three divorces are to be pronounced in three periods of purity. The Hanafis in support of their interpretation of the verse cite the incident of 'Abdullah b. 'Umar. He divorced his wife in the state of her menstruation. 'Umar consulted the Prophet about this act of his son. The Prophet expressing little anger said, "Abdullah has contravened *sunnat* (method, mode) ordained by Allah" and added, *من السنة تستقبل الطهراسقبلا فتطلقها لكل طهر تطليقة* "من السنة تستقبل الطهراسقبلا فتطلقها لكل طهر تطليقة"

¹⁷Ibid pp. 88-91.

¹⁸Al-Shaybānī, Imām Muḥammad : *Mawatta*, Karachi, Kitābal-Talaq, p. 250 :

"قال محمد طلاق السنة ان يطلقها لقبلى عدتها طاهرا من غير جمع حين تطهر من حيضها قبل ان يجامعها وهو قول ابى حنيفة والعمامة من فقهاءنا"

¹⁹Ibn Nuḡaym : op. cit. p. 256; Al-Kāsanī : op. cit. p. 91 ; Al-Sarakhsī : op. cit. p. 3 ; Damād Āfandī (d. 1078 A.H.) : *Majma' al-Anhur*, Cairo, 1928 A.H. vol. i, pp. 381—82.

²⁰Al-Qur'ān, surah Al-Talāq, 65 : 1.

i.e. proper divorce is that which you pronounce one in each period of purity.²¹

The view point of Imam Malik : All jurist Imāms other than Imām Mālik hold that *Talōq al-Ahsan* (Most approved form of divorce) and *Talaq al-Hasan* (Proper form of divorce) are both *Talōq al-Sunnat* (divorce according to tradition). According to Imām Mālik, to pronounce one divorce in each of the terms of purity, (the *Hasan* procedure), however, is also an innovation. Pronouncement of one divorce by the husband is the only divorce according to the Prophet's tradition, because divorce, in fact, is prohibited. It is permissible only in case of necessity of getting rid of the wife and the purpose is served by the pronouncement of one divorce only.²² Hence, divorce according to tradition, in the opinion of Imām Mālik, is that which is pronounced revocably once by the husband to his wife in the term of her purity in which he has not cohabited with her, and she is left alone during her term of probation of three menstruations, and during these periods no further divorce need be pronounced.²³ According to Imām Mālik, it is essential for *Talōq al-Sunnat* that no further divorce during the term of probation be pronounced.²⁴ The basis of his assertion is that the divorce, according to tradition (*Talōq al-Sunnat*), is that which is pronounced for carrying out a set purpose. The purpose is carried out by the pronouncement of one divorce. Hence, the pronouncements of second and third divorce in the second and third terms of purity being unnecessary are abominable. Likewise, the pronouncement of all the divorces at a time, according to Imām Mālik, are abominable, in as much as the first

²¹Al-Kasānī: op. cit. p. 89: Al-Sarakhsī, Shams al-Dīn (d. 482 A.H.): *Al-Nukat*, Commentary on Al-Shaybanī's "*Al-Ziyādāt*", Hyderabad Deccan, 1328 A.H. pp. 2—4; Baiyhaqī: *Kitāb al-Sunan al-kubrā*, Hyderabad, Deccan, vol. viii, p. 334. This tradition has been described in *Sahīh*, of Bukhārī and Muslim in the following words (vide *Mishkāt al-Masabih*, Karachi, p. 283) :

”عن عبدالله بن عمر انه طلق امرأة له وهي حائض فذكر عمر لرسول الله صلى الله عليه وسلم فتغيط فيه رسول الله صلى الله عليه وسلم ثم قال ليراجعها ثم يمسه حتى تطهر ثم تجيض فتطهر فان بداله ان يطلقها فليطلقها طاهراً قبل ان يمسه فتاك العدة التي امر ان تطلق لها النساء و في رواية مره فليراجعها ثم طلقها طاهراً او حاملاً متفق عليه“

²²Ibn Sā'ātī : op. cit. p. 5.

²³Al-Kasānī : op. cit. p. 89 :

”ال مالک لا اعرف طلاق السنة الا ان يطلقها واحدة ويتركها حتى تنقضي“

²⁴Ibn Rushd (d. 595 A.H.) Egypt, 1379, vol. ii, p. 63.

divorce having taken effect the second and third divorces are superfluous being unnecessary.

Imām Shāfi'ī's view point : The pronouncement of three divorces at a time, according to Imām Shāfi'ī is also in accordance with *Talāq al-Sunnat*, whereas the pronouncement of three divorces at a time, according to Hanafīs and Imām Mālik, cannot be said to be *Talāq al-Sunnat*. Imām Shāfi'ī argues on the basis of tradition of *Mula'annah*²⁵ that 'Ajlānī after imprecating his wife pronounced three divorces to her in the presence of the Prophet. If the three divorces were not *Sunnat* the Prophet would not have maintained silence. He must have, then and there, told Ajlānī that his was not the proper way of pronouncing divorce. The Mālikis, in reply, say that 'Ajlānī had pronounced three divorces after imprecating his wife. The very imprecation had made the wife irrevocably divorced; therefore, the pronouncements of divorces thereafter were meaningless.²⁶

Hanafīs' interpretation : Imām Kasani, a renowned Hanafī jurists construes this averment by Imām Shāfi'ī in the way that he neither called it *Talāq al-Sunnat* nor *Talāq al-Bid'at*.²⁷ Kasani's interpretation of Imām Shāfi'ī appears to be more correct than the assertion of Ibn Ruṣḥd. This is supported by other books of *fiqh* as well.

II. Talāq Al-Bid'at (Innovated Divorce) and its kinds :

Innovated divorce is also called impious divorce.²⁸ Pronouncing such a divorce is sinful.

The innovation being of two kinds :²⁹

- (a) As regard time,
- (b) As regards number.

²⁵Abū Dd'ūd (d. 275 A. H.) : *Al-Sunan*, Karachi 1329 A.H. p. 305.

”عن ابن شهاب ان سهل بن سعد الساعدي اخبره ان عويمر بن اشقر العجلاني الى آخر الحديث - وفيه، فا قبل عويمر حتى اتى رسول الله صلعم وهو وسط الناس فقال يا رسول الله ارايت رجلاً وجد مع امراته رجلاً ايقنله فتقتلوه ام كيف يفعل فقال رسول الله صلى الله عليه وسلم قد انزل فيك وفي صاحبك قرآن فاذهب فأت بها قال سهل فتلا عنا وانا مع الناس عند رسول الله صلى الله عليه وسلم فلما فرغا قال عويمر كذبت عليها يا رسول الله ان امسكتها فطلقها ثلاثاً قبل ان يا مره النبي صلى الله عليه وسلم“

²⁶Ibn Ruṣḥd : op. cit. vol. ii, p. 64.

²⁷Al-Kasānī : op. cit. vol. iii p. 94 :

”وقال الشافعي لا اعرف في عدد الطلاق سنة ولا بدعة بل مباح“

²⁸Iman kasānī has also stated this *Talāq* as *Talaq Makrūh* i.e. undesirable divorce (Al-Kasani, op. cit., p. 88).

²⁹Ibid.

Timing of Divorce : If a revocable divorce is pronounced at a time when the woman is in menstruation, it will be said to be an innovated divorce. In such a case it has been held incumbent upon the husband to have recourse to his wife. Burhān al-Dīn Marghīnānī, the author of *Al-Hidayah* has explained why in the divorce which is pronounced during menstruation having recourse to the wife is incumbent. He says that the intrinsic meaning of the injunction regarding divorce as contained therein may be duly observed and as far as possible committing sin may be avoided and the wife, too, may not suffer from the agony of observing a longer term of probation.³⁰ The necessity of having recourse to the wife, in the event of divorce during menstruation, is supported by the authentic report that when *Hadrat* Abdullah b. 'Umar divorced his wife during her menstruation and *Hadrat* 'Umar consulted the Holy Prophet about it, he replied, "Ask him ('Abdullah b. 'Umar) to have recourse to his wife".³¹

Effectiveness of divorce pronounced during menstruation : The impiety of divorcing one's wife during menstruation lies in the fact that the man does not have, as it is natural, inclination towards woman at such time. Besides, the term of probation is lengthened by so doing, because the menstruation period in which the divorce is pronounced is not taken into account and the woman is unnecessarily put into trouble.³² However, according to all the four schools of law (Ḥanafī, Mālikī, Shafī and Ḥanbalī) the divorce pronounced during menstruation is effective. On the other hand, according to Shi'ah sect the divorce pronounced during menstruation is not effective.

Modern Legislation :

Morocco—Talaq during menstruation : Art. 47. Where a talaq is pronounced during the wife's menstruation period, the Qādī shall compell the husband to revoke it.

Effectiveness of divorce pronounced during purity but after cohabitation : As regards timing, that divorce shall also be called impious which the husband pronounces to his wife during such a period of her purity in which he has cohabited with her. Such a divorce is against tradition on the ground that the wife may have got pregnant on account of which she will have to observe the term of probation for a longer period.³³ According to

³⁰Ibid, p. 93.

³¹Al-Shaybānī : *Muwattā*, Karachi, *Kitab al-Talaq*, Chapter on *Talāq al-Sunnah*, p. 250 :

”عن عبدالله بن عمر انه طلق امرأته وهي حائض في عهد رسول الله صلى الله عليه وسلم فسأل عمر عن ذلك رسول الله صلى الله عليه وسلم فقال مره فليراجعها“

³²Al-Kasānī : op. cit. vol. iii, p. 94.

³³Ibid, p. 94.

Shi'ah theologians such a divorce is ineffective, but the followers of the four Sunni schools of *fiqh*, inspite of its being against tradition, are convinced of its effectiveness.

The author of *Majma'al-Bahrayn* has written that divorcing a wife with whom marriage has been consummated, during her menstruation, is abominable; whereas divorcing a wife not cohabited with, during her menstruation, is valid without any abomination,³⁴ as the term of probation is not incumbent upon a wife not cohabited with.

Numbers of divorce : The pronouncement of two or three divorces, instead of one, at a time in one period of purity is included in the definition of innovated divorce, though the pronouncement be in one or more than one words. For instance, the husband divorces his wife either by saying, "you are divorced thrice" or by saying "you are divorced, divorced, divorced".³⁵

According to Shi'ah sect no divorce is effected by the pronouncement of three divorces at a time,³⁶ whereas according to Sunnī jurists, in general, three divorces are effective by the pronouncements of three divorces with one word or at one time. Indeed, the pronouncer of such divorces shall be a sinner.³⁷

Pronouncing of divorces all at once is abominable as it contravenes the intent of the Qur'ān, ^{37a} "الطلاق مرتان فامساک بمعروف او تسريح باحسن". A divorce is only permissible twice: after that the parties should either hold on equitable terms or separate with kindness". (For a detailed discussion on the subject please refer to Section 118 *infra*).

(B) *Divorce as regards its effects :*

Revocable Divorce :

Revocable divorce is that in which the separation occurs after the lapse of the term of probation and the husband without contracting marriage anew has the right of having recourse to his wife during her term of probation. When a person, therefore, pronounces one or two divorces to his wife and with the word of divorce does not use the word, *bā'in* (irrevocable), for instance, he says to his wife, "I divorce thee", it would amount to a revocable divorce and the husband may have recourse to his wife

³⁴Ibn al-Sa'āti : op. cit. p. 9; Damād Āfandi : op. cit. vol. i, 381-382.

³⁵Al-Haskafī : op. cit. vol. ii, p. 430; Al-Kasānī : op. cit. vol. iii, p. 94.

³⁶Al-Hillī. *Najm al-Din Abu Ja'far* (d. 474 A.H.) : *Shara'i' al-Islam*, Tehran, p. 209.

³⁷Al-Kasānī ; op. cit. vol. iii, pp. 93-94.

^{37a}Al-Qur'ān, surah Al-Baqara, II : 229.

within her term of probation, whether she is agreeable to it or not.³⁸ (For a detailed discussion on the subject of having recourse to a divorced wife please refer to Section 116 infra).

Irrevocable divorce of minor degree (*talāq bā'in ṣughra*) :

Irrevocable divorce of (minor) degree is that in which the separation occurs at once without the lapse of the term of probation and the marriage relationship of the husband and wife breaks off. The husband cannot have recourse to his wife during her term of probation. But, after the lapse of the term of probation, if the parties mutually agree, they may re-enter into marriage contract. Thus, if a person pronounces one or two divorces to his wife and alongwith it uses the word *bā'in* (irrevocable), for instance he says "I pronounce to thee one or two irrevocable divorces," then according to the three schools of fiqh, other than that of Imām Shafi'ī, the woman shall stand irrevocably divorced and the husband during her term of probation can have no recourse to her. But the husband may re-enter into marriage contract with his wife by mutual consent during or after her term of probation.

Irrevocable divorce of major degree (*ṭalaq bā'in kubrā*) :

Irrevocable divorce of major degree is that as a result of which the husband cannot re-inter into marriage contract with his divorced wife unless she after having married and having intercourse with another person secures divorce from him or that he dies.

According to jurists in general, irrevocable divorce of major degree takes place when the husband at a time or at different times pronounces three divorces by one or more words to his wife.³⁹ (For details on the subject please refer to Section 118 infra).

Indo-Pakistan Law:

Revocable and irrevocable divorce : Under Muslim Law a *talāq* may be revocable or irrevocable depending upon the form in which it is pronounced. In the case of irrevocable divorce the contract of marriage is dissolved immediately and cannot be revived. In the case of revocable divorce the husband has *locus penitentia*, and may take back his wife at any time during the period of '*iddat*'. But under S. 7 of the Muslim Family Laws Ordinance, 1961 divorce is not irrevocable.

³⁸Al-kasānī : op. cit. vol. iii, p. 180.

”و كذلك يملك مراجعتها بغير رضاها“

Damad Āfandī : op. cit. vol. i, p. 432.

³⁹Al-Kāsānī : op. cit. vol. iii, p. 187; Damād, Afandī ; vol. i, p. 437.

Kinds of ṭalāq : There are two approved forms of divorce, (*talaq al-Sunnah* known as *talaq al ahsan* and *talaq al hasan*, and an unapproved form known as *talaq bid'at*.

Talōq al-Aḥsan : *Talōq al-Aḥsan* is effected when the husband pronounces one divorce during a *tuhr* in which cohabitation has not taken place between the parties, and then abstains from cohabitation during the 'iddat. The *ṭalōq* becomes irrevocable at the end of the period of iddat, but during that period the husband can take back his wife at any time. When the woman is not subject to monthly courses the *talōq* can be pronounced even after cohabitation. The divorce becomes irrevocable only on the completion of 'iddat which is three periods, and when the woman is not subject to periods it is three months. When the woman is pregnant the 'iddat comes to an end on the delivery of the child, whichever is later.

Talōq al ḥasan : *Talaq-al-Hasan* is effected when the husband repudiates his wife during a *tuhr* in which he has not had carnal connection with her, and then repeats the repudiation during the next two *tuhrs*. The third repudiation or pronouncement makes the divorce final and irrevocable. Imām Mālik does not, however, consider it a *talaq-al sunnah*.

Talaq-al-Bid'at : *Talaq al-Bid'at* is effected by pronouncing *ṭalōq* thrice during the same *tuhr*, or in pronouncing the formula of *ṭalāq* once with the condition that it should be considered to have been said thrice. As when the husband says "I divorce thee thrice." (7 Bom. 180; 39 I. C. 513; 39 All 371). Where a single irrevocable divorce is pronounced it is a *Talaq al-bid'at*. (30 Bom. 537; AIR 1929 Pat. 81; 151 I. C. 546). It is immediately effective and irrevocable. (PLD 1962 Dacca 63; 13 DLR 533; AIR 1932 P. C. 25-135 I.C. 762). *Talōq al-bid'at* is the most common and prevalent mode of divorce in India and Pakistan. (1917, 36 All 371; 39 I. C. 513). It is not prohibited even during the woman's courses. (AIR 1929 Patna) 81). This form of *talaq* is not recognised by Shi'ah law.

Pakistan's Muslim Family Laws Ordinance : From a comparison of the forms of *ṭalāq* it appears that under S. 7 the Muslim Family Laws Ordinance 1961 has enforced in Pakistan a kind of *ṭalāq* which is in consonance with *ṭalāq al-ahsan*. In the case of *Talaq al-ahsan* the divorce becomes irrevocable after the period of 'iddat, and in case of *ṭalōq ḥasn* it becomes irrevocable on pronouncement for the third time in the third *tuhr* after the first pronouncement. Thus, the least period after which *ṭalōq* becomes irrevocable according to *Talaq Sunnah*, i.e. approved form of divorce, is approximately 90 days. In this sense there has been no change in Muslim Law. On the other hand, it has been consolidated and enforced by the Ordinance. The only form affected by the Ordinance is the *Bid'ī* form which becomes effective immediately after it is either uttered orally or written

down on a piece of paper or on something else from which it can be deciphered. (PLD 1962 Dacca 630; 13 DLR Dacca 533). Now a *ṭalāq* in that form will become effective after the expiry of 90 days.

Notice of talāq to wife: Under the traditional Muslim Law no notice of *ṭalāq* was required to be given to the wife and in the case of as written *ṭalāq*, the *ṭalāq* became operative from the time of writing and not from the time when it was received by the wife. (PLR 1964 Dacca 377; PLD 1951 Lah. 467; PLR 1951 Lah. 719; AIR 1937 Lah. 611; (1905) 30 Bom. 375; AIR 1937 Lah. 270). That could obviously cause grave injustice where the husband executed a *ṭalāqnamah* but did not communicate it to his estranged wife, but this has been remedied under Muslim Family Laws Ordinance, 1961. Under Section 7 of the Ordinance it is obligatory on the husband to give a copy of the notice given to the Chairman to the wife and if he does not do so he will be liable to prosecution under sub-section (2). But otherwise the notice will have no effect on the validity of the *ṭalāq* or the date on which the *ṭalāq* becomes effective. Where the whereabouts of the wife are not known and cannot be ascertained by the husband with due diligence it has been provided in the Rule that notice may be served on her with permission of the Chairman through her father, mother, adult brother or adult sister. But if she has no such relation or where their addresses cannot be ascertained with due diligence, the husband may, with the permission of the Chairman, serve the notice or *ṭalāq* on her by publication in a newspaper, approved by the Chairman. It is, however, necessary that the newspaper should have circulation at the place where he last resided with the wife. (West Pakistan Rules R. 3(a) Substituted in 1965).

Section 99. Every Muslim husband, during the continuance
 Numbers of Divorce of his marriage contract, is entitled to pronounce divorces to his wife upto three in number.

COMMENTARY

The husband under Islamic law is entitled to pronounce divorce to his wife upto three in number. The wife after three divorces becomes forbidden to the husband. He is neither entitled to have recourse to her nor is he entitled to remarry her (after the lapse of her term of probation) except when she after marrying another person and having sexual intercourse with him obtains divorce from him or he dies.⁴⁰ Thus a person during his

⁴⁰Al-Qur'ā'n, surāh Al-Baqara II : 229, 230.

”الطلاق مرتان فاسمك بمعروف او تسريح باحسان . . . فان طلقها فلا تحل له حتى تنكح زوجاً غيره“

marriage relationship after pronouncing revocable divorce to his wife at best twice may have recourse to his wife but after his third pronouncement the number of divorces is completed and the wife shall be separated from him altogether. This is with regard to a wife whose marriage has been consummated.

If one divorce is effected to a wife before consummation of her marriage the marriage-tie shall snap at once and the wife shall become forbidden (*ḥarām*) to him. He cannot have recourse to her. But he may re-contract marriage with her, if she consents, after the expiry of her term of probation.⁴¹

It may, however, be remarked that for determining the permissible number of divorce the status of woman shall be taken into consideration as to whether she is free or not and whether the marriage has been consummated or not⁴². The question of '*iddat*' will also be relevant in that context.

Section 100. Every major Muslim husband of sound mind, except those enumerated in sections 110 to 115, has capacity to pronouncing of divorce to his wife.

Capacity for
pronouncing
divorce

COMMENTARY

It is essential that the pronouncer of divorce should be the husband or his representative or his delegate. The father or the guardian has no right to pronounce divorce to the wife of his minor child or ward. A Tradition about the capacity of pronouncing divorce is narrated from Ibn 'Abbas which means that man who has become the master (controller, as husband) of woman can alone pronounce divorce.⁴³

First Condition—Soundness of Mind :

It is essential that one who pronounces divorce must be of sound mind.⁴⁴ It is a condition requisite that the representative and the delgate

⁴¹See Section 119 *infra*.

⁴²*Al-Shaybānī* : *Muwattā*, Karahi, p. 252; 'Abdulla b. Mahmūd b. Mawdūd (d. 683 A.H.) : *Al-Ikhtiyar fī ta'līl al-Mukhtar*, Cairo, 1370 A.H. vol. iii, p. 173 :

”لا عدة في الطلاق قبل الدخول“

⁴³*Ibn Humām* : op. cit. vol. iii, p. 44 :

”انما الطلاق لمن اخذ بالساق“

⁴⁴*Al-Qudūrī*, Abul Hasan (d. 428 A.H.) : *Al-Mukhtasar*, Karachi, *Kitab al-Talaq*, p. 157; *Al-Nasafi* : op. cit. p. 115; *Ibn al-Abidin*, Muhammad Amin (d. 1252 A.H.), Cairo, 1356 A.H. vol. ii, p. 428; *Fatawa Alamgiri*, Majidi Press, Cawnpore, vol. ii, p. 144; *Al-Hilli* : op. cit. p. 205.

of the husband must also be of sound mind. Thus the divorce pronounced by a person who is mad, imbecile, mentally unbalanced, unconscious or is suffering from meningitis shall not take effect.⁴⁵ (Divorce pronounced by such persons has been discussed in detail under section 110 infra). The divorce, pronounced by a person who is idiot but is otherwise fully capable of understanding its inherent meaning and its effect, shall take effect, in as much as the person cannot be taken to be completely devoid of sense.⁴⁶ Ibn al-ʿĀbidin, in his book, *Radd al-Muhtār* has said that in such a case it shall have to be observed whether most of the actions of such a person are normal in his daily routine life. If it is observed that they are not so, the divorce pronounced by him shall be considered to have been pronounced by an imbecile person and shall be held to be ineffective.⁴⁷ In view of the present writer also, it is advisable in such a case to decide the question about the effectiveness of divorce, after examining the general dealings in the normal daily life of the man deficient in senses.

Second Condition—Majority :

The second condition with respect to the capacity of the person pronouncing divorce is his majority. The divorce pronounced by a child though approaching the age of majority shall not be effective.⁴⁸ The divorce pronounced by him during minority cannot be made effective even after his attainment of the age of majority.⁴⁹ Indeed on the attainment of the age of fresh divorce may be pronounced, if he so wishes. According to Sunnīs a guardian has no authority to pronounce divorce on behalf of the minor. According to Shiʿahs as well the guardian has no such authority.

⁴⁵In al-Abidin : op. cit. vol. ii, pp. 428-38; Ibn Nujaym : op. cit. vol. iii, pp. 263-68; Al-Marghīnānī: Burhan al-Din (d. 593 A.H.) : *Al-Hidayah* Karachi, vol. ii, p. 358; Al-Kasānī : op. cit. vol. iii, p. 99-100, Al-Hilli : op. cit. *Sharaʿi al-Islam (Kitab al-Talāq)*, p. 205.

⁴⁶All-Kasānī : op. cit. vol. iii, p. 100.

⁴⁷Ib al-Abidin : op. cit. vol. ii, p. 434-38.

⁴⁸Damad Afandi : op. cit. vol. i, p. 384-85; Al-Kasānī : op. cit. vol. iii, p. 99-100; Ibn al-Abidin : op. cit. pp. 428, 437-38; Fatawa, Alamgiri : op. cit. vol. ii, pp. 144-45; Al-Hilli : op. cit. p. 205; Ibn Nujaym : op. cit. vol. iii, p. 263-68; Al-Marghīnānī ; op. cit. vol. ii, p. 358.

⁴⁹*Fatawa Alamgiriyyah*, op. cit. vol. ii, p. 145; Ibn al-Abidin op. cit. vol. ii, p. 437.

The right of pronouncing divorce belongs exclusively to the husband.⁵⁰ For the purpose of contracting marriage and pronouncing divorce, the age-limit is to be fixed under the Islamic Law. The Majority Act 1875 as inforce in Pakistan has no application.⁵¹

Modern Legislation :

Turkey : Art 102. The husband shall be capable to pronounce a divorce if he is legally responsible (*Mukallaf*).

Syria : Art. (1) A man shall be competent to divorce his wife after the completion of eighteen years of age.

(2) In a case where a man has married before attaining the age of eighteen years, the Qādī may permit a divorce, or confirm it after it takes place, if it involves some benefit.

For the purpose of pronouncing divorce, as stated above, it has been made essential in the Syrian law, *Al-Ahwal al-Shakhsiyya* that the man at the time of pronouncing divorce must have completed 18 years of his age.⁵² Indeed, if the man is mature though he may not have completed 18 years of his age, the Qādī may allow him to pronounce divorce or may hold the divorce pronounced by him to be valid.⁵³

Pakistan : Under Ordinance VIII of 1961, the age of female and male for the purposes of contracting marriages has been fixed at 16 and 18 years respectively; hence under this law the question of pronouncing divorce before attaining this age does not arise.

It may, however, be remarked that although the contracting of marriage of a man at less than 18 years of age has been made a criminal offence under the Prohibition of Child Marriages Act, 1929, the marriage, if contracted, shall be valid.⁵⁴ Thus, if divorce is pronounced in case of a marriage contracted at less than 18 years of age but after attaining his physical maturity, it shall be valid under traditional Muslim law.

⁵⁰Al-Hilli : op. cit. p. 205 :

”ولو طلق وليه لم يصح لا اختصاص الطلاق بمالك البضع“

⁵¹Section 2.

⁵²Section 85 (1) :

”يكون الرجل متمتعاً باهلية الكفاية للطلاق في تمام الثمانية عشرة من عمره“

⁵³Section 85 (2) ;

”يجوز للقاضي ان ياذن بالتطليق ، او يجوز الطلاق الواقع من البالغ قبل الثمانية عشرة اذا وجدت المصلحة في ذلك“

⁵⁴Muslim Family Laws Ordinance viii 1961, Sec. 12.

Indo-Pakistan Law :

It was held in *Mst. Fatima v. Fazal Karim Mea*, (A. I. R. 1926, Cal. 303): The Majority will be determined by the provisions of the Muslim law and not by the Majority Act. Hence a person who is major under the provisions of Muslim law but a minor under the Majority Act can lawfully delegate to his wife or to another person the power to divorce. It has also been held by a Court that even if the parties are minors, consent on his or her behalf can be expressed by the guardian for marriage who is legally authorised to make a valid contract of marriage. (*Marfat Ali Mirja v. Jabeedunnessa Bibi*, 45 C. W. N. 910).

Pakistani Muslim male married to Christian female under British law in England, marriage may be dissolved by 'talāq' under Muslim Law : Under the rules of Private International Law, the *lex loci celebrationis*, as such has nothing to do with the question of divorce which is a matter solely for the law that happens to be the *lex domicile* of the parties, at the time of the suit. This may very well be different from the law that governed the solemnisation of the marriage. The right of the Muslim husband to grant a divorce to his wife, in respect of the marriage recognised by Muslim Law, does not appear to have been taken away by any statute current in Pakistan. Therefore, *talāq* given by the husband in Pakistan to his Christian wife, in case of a marriage solemnized in London (England) before a Registrar, had become effective. [PLD 1967 S. C., 580;20 DLR (SC) 27].

Section 101. Every validly married woman, or the one who is undergoing her term of probation of a revocable divorce, except the one who has been once divorced before cohabitation, is a fit subject of divorce.

Subject of
Divorce.

COMMENTARY

As the possessing of capacity by a man is necessary for his validly pronouncing divorce so it is necessary for a woman that she must be legally liable to be subject of a divorce. Divorce is the renunciation of marital relationship established through a marriage contract. Hence, for being a fit subject of divorce it is necessary that the woman must be legally wedded to the pronouncer of divorce or must be observing the term of probation after a revocable or one or two irrevocable divorces by him. However, the man's capacity of pronouncing divorce is dependent on his being major and of sound mind. That is, there is a condition that at the time of pronouncing divorce the man must be major and of sound mind. But for a woman there is no such condition of majority or being of sound mind needed for a valid divorce. Thus, a wife who is minor or insane may be

subject of a divorce. However, in case of delegated authority of divorce to the wife, if she pronounces divorce to herself she must in that event be of sound mind and major, as she acts independently in the exercise of a right which should be exercised properly.

Divorce to a woman who is a stranger : All jurists concur that the woman who is in marriage or who is observing the term of probation of revocable divorce, remains a fit subject for divorce, that is, she may be subjected to divorce. But the fact whether a conditional divorce can be made effective on a woman who is a stranger, is a controversial question. For instance, if someone says, "If I contract marriage with any woman or contract marriage with that particular woman she stands divorced", what shall be its effect ?

Herein there are three points of view as under:—

1. Divorce to a woman who is stranger shall not take effect, whether the pronouncement be general or particular. This is said to be the view of Imāms Shafi'ī and Aḥmad b. Ḥanbal.
2. Soon after the contract of marriage the divorce shall take effect, whether the pronouncement be general or particular. This is the view of Imām Abū Ḥanīfah.
3. Divorce shall not take effect if its pronouncement is general. If the pronouncement is with respect to a particular woman, divorce shall take effect after the performance of marriage contract. This is the view of Imām Malik.⁵⁵

Modern Legislation :

Turkey : Art. 103. The object of divorce is a woman contracted into a valid marriage or one observing 'iddat. A woman whose marriage has been dissolved (by *faskh*) cannot be divorced even during the period of 'iddat.

Syria : Art. 86. The object of divorce can be either a lawfully married wife or a wife revocably divorced and observing 'iddat; it is not valid for any other woman.

Morocco : Art. 45. The object of talaq may be a lawfully married wife or a divorcee observing 'iddat of a revocable divorce; in any other case a divorce will not be valid, even if conditional.

⁵⁵Ibn Rushd : op. cit. vol. ii, pp. 83-84; Al-Tirmizi, Muhammad Ibn 'Isa (d, 279 A.H.) : *Al-Jami'*, Karachi, p. 190 :

”لا طلاق فيما لا يملك“

Section 102. Divorce may be effected by explicit or implied
Effecting
divorce words or by signs.

Explanation : If any one of the spouses is suffering from a disability to pronounce or hear the words of divorce it may be effected by such signs as are known and specific.

COMMENTARY

Explicit Divorce :

Divorce gets effected by explicit words. The intention of the pronouncer of divorce, in that case, is not taken into account.⁵⁶ If some one instead of pronouncing the word "*talaq*" (divorce) pronounces some other word of his own language specially meant for divorce it will be regarded to be in the order of explicit divorce.

Implied Divorce :

Divorce takes effect by implied word as well, provided the pronouncer must have pronounced that word with the intention of effecting divorce. The words of implied divorce are not particularly meant for pronouncing divorce but intrinsically the word has the possibility of conveying the sense that it may be used for effecting divorce and that circumstantially it may mean divorce. If divorce is intended by those words by its pronouncer, divorce shall take effect, otherwise it shall not.

Implied divorce takes effect in all conscience provided the pronouncer means and intends to effect divorce.⁵⁷ The import of the word of the pronouncer of divorce is a matter between him and his God. Indeed, in case of such a divorce getting operative through courts of law an inquiry shall have to be made into the condition of the couple, and the circumstances shall have to be taken into account whether they, at the time, were under any one of the following situations:—

1. In a state of conjugal harmony, that is, whether the words of implied divorce were pronounced in a state of cheer and pleasantry.
2. In a state of anger and quarrel, that is, the words of implied divorce were pronounced in a state of dispute over some matter.

⁵⁶Ibn Nujaym : op. cit. vol. iii, p. 270; Al-Kasānī : op. cit. vol. iii, p. 101.

⁵⁷Al-Haskafī : op. cit. : Egypt 1324 A.H. vol. ii, p. 635 :

“لا تطلق بها قضاء الا بنية او دلالة الحال”

Ibn, Ābidin : op. cit. Egypt. 1324 A.H. vol. ii, p. 635-36 :

“قيده به لانه لا يقع ديانة بدون النية ولو وجدت دلالة الحال”

3. In the course of talk of divorce amongst themselves.⁵⁸

If the state is that of harmony all the words of implied divorce, in the absence of intention, shall in no wise in all conscience or judicially constitute divorce. On the other hand, in the other two situations in view of the conditions, circumstances, and evidence if they are some words of implied divorce their utterance may judicially constitute divorce.⁶⁹

Forms of Implied Divorce :

There are two forms of implied divorce :—

1. Implied by nature.
2. Implied in law.

Implied by nature : By this term such words are meant that are not specific for divorce but the meaning of divorce may be concluded therefrom. There are many words of such type. For instance, *bā'in* (separate), *harām* (forbidden), *amrak biyadiki* (your affair to your hand), *ikhtārī* (you do opt), *i'taddī* (count your term of probation), etc.

Implied in law : By this term such words are meant that are pronounced or inscribed on paper and the pronouncer of divorce does not therein addresses his wife. He simply writes the word, "Divorced" or he merely writes, "She is a divorced one". In such cases, if his intention is to effect divorce, it shall then take effect in all conscience, otherwise not. This form of divorce is known in law, as "implied divorce" because the husband when he inscribes or pronounces the word, "Divorced" or says, "She is a divorced one" he, not being entitled to divorce the wife of any other person, shall be taken to have inscribed or pronounced the words with the intention of divorcing his wife, and it shall as such take effect.⁶⁰

Divorce by Dumb and Disabled Persons :

According to Ḥanafīs, divorce of dumb persons by signs shall be effective provided the signs are known and are specific ones. In such a case the signs shall be deemed to be the substitute of words.⁶¹ If the dumb person is literate his writing alone shall be relied upon. Other Imāms concur with this view. Thus divorce conveyed by signs by a dumb person who is literate shall not be effective.⁶²

⁵⁸Ibid.

⁵⁹For detail see Al-Kāsanī : op. cit. vol. iii, p. 106.

⁶⁰For further detail see Ibn al-Humām : op. cit. vol. iii, p. 42; Ibn al-ʿAbidin, op. cit. vol. ii, p. 436.

⁶¹Al-Ḥaskafī; op. cit. vol. ii, p. 436; Fatawa Alamgirāyyah, op. cit. vol. ii, p. 146; Al-Marghinanī : op. cit. vol. iv, p. 335.

⁶²Ibn Qudama (d. 620 A.H.): *Al-Mughnī*, Cairo 1311 A.H. vol. iii, p. 267.

Modern Legislation :

Turkey : Art. 109. A divorce may be effected by definite words or expressions commonly recognised as expressions of divorce; but such metaphorical expressions as are not common for divorce shall have the effect of divorce only if it is intended by the husband. Where the parties have a dispute as to the correct intention of the husband, he shall swear on oath.

Syria : Art. 87. A divorce shall take place either by words or by a letter or, in the case of a person unable to speak, by known gestures.

Art. 93. A divorce shall take place by express words or by customary expressions, if not unintended, and by metaphorical expressions it shall take places only if actually intended.

Morocco : Art. 46. Talaq may take place when effected verbally in explicit terms, or in writing, or by non-equivocal signs or gestures in the case of illiterates.

Indo-Pakistan Law :

Pronouncement of divorce : A Muslim male of sound mind, who has attained puberty, may dissolve his marriage at any time at his sweet will without assigning any reason for it. (PLD 1951 Lah. 467; 33 Mad. 22; 3 I.C. 730; 59 Cal 833). It is however to be noted that this must be done by pronouncement of divorce. There can be no presumption of divorce by the mere fact that the husband and wife have been separated for a long time. (PLD 1967 BJ 1).

Oral divorce : Hanafi Law does not prescribe any particular form for the pronouncement of *ṭalāq*. (36 All 48; 25 I. C. 387). But the *ṭalāq* must be pronounced only during the period between two *tuhrs* (menstrual periods). Where *ṭalāq* is pronounced to a wife who has crossed the age for period menstruation, the condition that oral declaration of divorce should be made between two periods of *tuhrs* would not be applicable, because it would be physically impossible to have separate periods between which such a declaration could be made. (AIR 1961 Bombay 121). The words employed may be either express or implied. If they are express no proof of intention is required, but if the words are ambiguous, intention to divorce, (AIR 1927 P.C. 15; 100 I.C. 1), and the fact that the words should expressly refer to the wife must be proved. (AIR 1927 P.C. 15; 100 I.C. 1.; 33 Mad. 22; 3 I.C. 730; AIR, 1932 P.C. 25; 135 I. C. 762).

Express or ambiguous words: When the words used are "Thou art divorced", "I have divorced thee" or "I divorce my wife for ever and render her 'haram' for me" it was held that the words were express and there was no need of proving the intention, (59 I.A. 21). But the following words

were held to be ambiguous, "Thou art my cousin, the daughter of my uncle, if thou goest" (2 All 71), and "I give up all relations and would have no connection of any sort with you." (AIR 1932 Oudh 34; 136 I.C. 209). The real difference between *marsumah* (customary) and *ghayr marsumah* (which are not customary) forms of *ṭalāq* is that in the former case *ṭalāq* is effected even when there is no intention to divorce. (PLD 1962 Dacca 630; 13 DLR 533), whereas in the latter case the intention to divorce must be proved. (PLD 1951 Lah. 467).

Modern Legislation :

Syria : Under the Syrian Family law divorce may effectively be pronounced by express or implied words. The person who is incapable of using both express or implied words, shall get divorce effected by known and specific signs.⁶³

Section 103. Every Muslim husband has the right of pronouncing divorce to his wife personally or to appoint, for pronouncing divorce, a prudent and major person of sound mind as his representative.

Pronouncing
divorce per-
sonally or
through rep-
resentative

COMMENTARY

All jurists are unanimous on the point that the husband himself may pronounce divorce or he may get divorce pronounced through his appointed representative. But it is a condition for the explicit divorce being operative that it be related to one's own wife.⁶⁴

The limitations and conditions with respect to capacity of pronouncing divorce as applicable to the husband himself shall be applicable to the representative as well.

Divorce by minor representative : It is necessary that the representative for pronouncing divorce be of sound mind and major. If the representative is minor the divorce pronounced by him shall not be operative. It is also necessary that the authorisation of the representative be explicit. The appointment of another person as representative for divorce means that the

⁶³Section 87, Qanūn al-Aḥwāl at Shakhsīyah :

”يقع الطلاق باللفظ وبالكناية ويقع من العاجز عنها بإشارة المعلومة“

⁶⁴Al-Ḥaskafī : op. cit. vol. ii, p. 487-89; Qanūn al-Aḥwal al-Shakhsīyah, Sec. 88 :

”للزوج ان يوكل غيره بالتطيق“

person is commissioned to exercise the delegated authority in accordance with the instructions of his principal.⁶⁵

Revocation of authority : In case of a representative, the husband has always the right of taking back the delegated authority or of limiting that authority provided the representative has not exercised the authority till then. There is, however, an exception to this rule that if the authority of pronouncing divorce is delegated by the husband to his wife, it cannot be revoked, unless agreed otherwise. (For full discussion on this point see sections 105 to 109 *infra*.) If the representative becomes insane the delegated authority would automatically lapse.⁶⁶

Section 104. For the divorce being operative the presence of witnesses at the time of its pronouncement is not necessary.

COMMENTARY

In connection with the evidence on divorce there is the following verse of the Qur'ān :

”يا ايها النبي اذا طلقتم انساء فطلقوهن لعدتهن ‘ واحصوا العدة وانقوا الله ريبكم لا تخرجوهن من بيوتهن ولا يخرجن الا ان ياتين بقا حشة مبينة وتلك حدود الله ومن يتعد حدود الله فقد ظلم نفسه لا تدرى لعل الله يحدث بعد ذلك امرا- فاذا بلغن اجلهن فامسكوهن بمعروف او فارقوهن بمعروف ‘ واشهدوا ذوى عدل منكم واقيموا الشهادة الله“⁷⁶

“O’ Prophet” when ye do divorce women, divorce them at their prescribed periods and count (accurately) their prescribed periods, and fear Allah, your Lord, and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. Those are limits set by Allah : and any who transgresses the limits of Allah does verily wrong his (own) soul: Thou knowest not if perchance Allāh will bring about thereafter some new situation. Thus, when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from amongst you endued with justice and establish the evidence (as) before Allah.”

The mandate conformable to *Shari’ah* derived from the word, “*Wa Ashhidū* (Take for witness) in the above stated Qur’anic verse is a subject of controversy in as much as whether it is incumbent or merely desirable.

⁶⁵Al-Haskafī: *ibid*.

⁶⁶*Ibid*.

⁶⁷Al-Qura’an, surah Al-Talaq: LXV : 1 & 2;

Evidence incumbent or desirable ?

There are divergent views about the presence of witnesses at the time of pronouncing divorce being mandatory or not. The views are, in the first place, based on different interpretations of the above-quoted verses 1 and 2 occurring in surah *Al-Talaq* (Divorce, Chap LXV) of the holy Qur'an. First, I will quote the opinion of the most learned commentators of the holy Qur'an, and thereafter Traditions and then the view of the most eminent Muslim Jurists.

Views of Commentators of the Qur'an : Imām Fakhr al-Dīn al-Rāzī has interpreted the words "Take two just men from amongst you" as "ordered that you take two just witnesses from amongst you at the time of divorce and its revocation". According to him, therefore, the provision of evidence is for both the occasions of divorce and that of having recourse to the wife.⁶⁸ The commentary of the Qur'an by Abu al-Sa'ud,⁶⁹ however, lays down that the mandate of evidence is *desirable* for both the occasions of having recourse and separation, as Allah says, "Have witnesses when you enter into the transaction of sale and purchase."^{69-a} (According to all the jurists at the time of buying and selling, the provisions of evidence is merely *desirable and not mandatory*). Zamakhsharī in his commentary, *Al-Kashshāf*⁷⁰ has merely said that there is the provision of evidence for both revocation and separation. Allama Qurtubī too has stated in his commentary, *Jamī' al-Ahkām al-Qur'ān*⁷¹ that at the time of divorce and having recourse to the wife there is the provision of evidence. Al-Bayḍāwī has, however, commented in *Anwār al-Tanzīl*⁷² that the provision of evidence in both the cases of revocation and separation is *merely desirable*. In *Tafsir al-Muḥīt*⁷³ the evidence in both the situations has been stated to be *incumbent*. The words, *Imsāk* (keeping back) and *Mufāriqat* (separation)

⁶⁸Al-Rāzī, Imām Abdul Raḥmān Muḥammad (d. 606 A.H.) : *Tafsīr Kabir*, Cairo, 1357 A.H. vol. xxviii, p. 34.

⁶⁹Abu Sa'ūd (d. 951 A.H.) : *Tafsīr*, Maktaba al-Husainyah, 1347 A.H. vol. v, p. 170.

^{69a}Al-Qur'an, surah Al-Baqara, 282 :

“واشهدوا اذا تباعدتم”

⁷⁰Al-Zamakhsharī; Mahmūd b. 'Umar (d. 538 A.H.) : *Al-Kashshāf*, vol. iii, p. 239.

⁷¹Qurtubī : *Jamī' al-Ahkām al-Qur'ān*, Dar al-Kutūb al-'Arabia, Cairo, vol. xxviii, p. 157.

⁷²Al-Bayḍāwī, Abdulla b. al-'Umar (d. 791 A.H.): Egypt, 1358 A.H.) vol. ii, p. 381.

⁷³Ibn Habbān; *Tafsir al-Muḥīt*, Cairo, vol. viii, p. 282.

have been explained, respectively as *Raj'at* (having recourse to) and *Talāq* (divorce) by the learned commentator. Ṭabṛī, in his commentary, quoting the assertion of Suddī, a Tābi'i (Successor of Companions) has also said that *Wa Ashhidū* (have witness) has been used concerning both "divorce" and "having recourse to".⁷⁴ In *Madārik al-Tanzīl, known as Tafsīr al-Nasafī* "to have witnesses at the time of having recourse to and separation" has been held to be *desirable*. So also is in *Tafsīr Ibn al-Kathīr*.⁷⁵

Analysis :

After the perusal of the above stated commentaries on the above verses, it is manifest that Imām Rāzi, Zamākhsharī, Qurtubī and Ṭabṛī do mention the provision of having witnesses in respect of separation and of having recourse to (there is no controversy about it); but they speak nothing about its being mandatory or desirable. Abu al-Sa'ūd, Bayḍāwī, Nasafī and Ibn al-Kathīr hold it to be "*desirable*" in both the cases, whereas the provision regarding evidence has been stated in *Tafsīr al-Muḥit* to be *incumbent* and the word, "separation" has been taken to mean "divorce". In fact, it is not proper to assume the meaning of "divorce" from the words, *Fariqū-Harna* (separate those women) in the verse. This is so in as much as the words, *Iza tallaqtumum-un-Nisā'* (when you divorce those women) in the beginning of the verse clearly bear upon divorce, whereas the words *Fāriqū-Hunna* (separate those women) point to the fact of giving up the wife on the completion of her term of probation after divorce. It is in the meaning of not having recourse to the wife. It is plainly a situation which may occur only after pronouncing divorce.

Traditions of the Prophet's Companions and their Successors : Ibn al-Mājah in his *Sunan* has quoted a tradition : "It was enquired from 'Amran b. Hasīn about a person who had divorced his wife and then had recourse to her, without having witnesses either at the divorce or at having recourse to her. 'Amran told him that he had pronounced divorce and had recourse to her in contravention of the tradition of the Prophet and that he should have had witnesses at the divorce and at his having recourse to her.⁷⁶ A clear averment of 'Aṭa that "the *nikah* is with witnesses and the divorce is with witnesses and its revocation is in presence of witnesses" has been quoted in *Tafāīr al-Darr al-Manthūr*. Imam Jassas, too, in his *Tafsīr*

⁷⁴Al-Ṭabṛī (d. 310 A.H.) *Tafsīr al-Ṭabṛī*, Maktaba al-Amīrya, (1329 A.H.) vol. xxviii, p. 88.

⁷⁵Ibn al-Kathīr (d. 774 A.H.) : *Tafsīr*, Egypt, vol. iv, p. 379.

⁷⁶Ibn Majah (d. 273 A.H.) *Sunan*, Karachi, p. 146 :

"عن عمر ان بن الحصين سئل عن رجل يطلق امراته ثم يقع بها ولم يشهد على طلاقها ولا على رجعتها فقال عمران طلقت بغير سنة وراجعت بغير سنة اشهد على طلاقها وعلى رجعتها"

Aḥkām al-Qur'an has reported the assertion of 'Aṭṭā through Ibn Jurayj, "The divorce and marriage and having recourse is to be in presence of witnesses". It appears from the said assertion that that 'Aṭṭā was convinced of the fact that the presence of witnesses was necessary at all the three occasions viz. at the time of contracting of marriage, pronouncing divorce and having recourse to.

Analysis :

From the study of these traditions (āṭḥār) it appears that there is a provision for the presence of witnesses at the occasions of "pronouncing divorce" and "having recourse to." There is no controversy about it. According to the said assertion of 'Amrān "having recourse to" and "pronouncing divorce" without the presence of witnesses are against *sunnah* of the Prophet. All the *Sunnī a'immaḥ* and jurists are in agreement on this point. However, it cannot be concluded that 'Amrān held such "divorce" or "having recourse to" inoperative or ineffective, or considered them to be null and void on account of the non-presence of witnesses.

Jurists' view : According to the jurists belonging to the known four schools, the presence of witnesses is no condition for the divorce being effective. It is rather *desirable*. On the other hand, the Zāhiriyyahs and Shi'ahs consider the presence of two just witnesses at the time of pronouncing divorce as a necessary condition for the divorce being affective.⁷⁷

Shi'ah's Contention : Muhammad al-Hasnain, in his book "*Asl al-Shi'atah wa Usuluhā*", writes thus :—

This *surah* is particular in respect of divorce and provisions relating to it. Hence it has been called the *surah* of Talāq (divorce). Allah has begun the *sura* with, *Iza Tallaqtumun-Nisā* and has mentioned about the pronouncement of divorce by the husband at the beginning of the term of probation. That is, the divorce should neither be pronounced during that period of purity in which the husband has had sexual intercourse with the wife, nor during the period of her menstruation. Thereafter, provisions regarding counting of the term of probation and the directive regarding not turning those women out of their houses have been laid down. Then, Allah stated cursorily about 'having recourse to, during the discourse on divorce. Thus Allah has said, "when their term of probation be near completion, retain them equitably", that is, when the term of probation be approaching its termination one concerned has either to retain them by having recourse to them or has to give them up equitably. Allah at the end of the directive

⁷⁷Ibn Hazm, Imam Abu Muḥammad (d. 456 A.H.) : Cairo, 1353 A.H., vol. x, p. 251.

has laid down about divorce, "You appoint two just witnesses from amongst you". That is, witnesses of divorce be appointed, the directives about which have already been mentioned."

In other words, the argument of Shi'ah jurists about the presence of witnesses at the time of divorce being incumbent is that the directive, "*Wa Ashhidu Zaway Adlim Minkum*" (have two just witnesses from amongst you) which is at the end of the verse is subjoined to the directive, *Fatalliqu Hunna li-Iddatihinna* (Divorce them for their term of probation) occurring at the beginning of the verse. And as it is incumbent that the divorce be pronounced having regard to their term of probation; similarly it is incumbent to have witnesses at the time of the pronouncement of divorce. The pronouncement of divorce without witnesses, therefore, according to them, shall not take effect.

Another argument relied upon by the Shi'ah jurists is that Ibn 'Abbas has said, "The presence of witnesses at having recourse to and at the pronouncement of divorce removes the difficulties of many types."⁷⁸

Criticism : The arguments of Shi'ah jurists in respect of the presence of witnesses at the time of divorce being incumbent carry little weight for the following reasons :—

1. At the outset it may be remarked that, according to all the *Sunnī* jurists *a'immaḥ*, it is not incumbent to have witnesses at 'having recourse to' or at 'separation', (after the completion of the term of probation). The Qur'ānic phrase, "*Wa Ashhidū* (have witnesses) though imperative in mood and intrinsically a directive but read with the other two phrases "*Fa amsikuhunna*" (then retain them) and, "*Fariquhunna*" (separate them), the inference drawn is that instead of being incumbent it is desirable, as 'having recourse to' and "separation" are voluntary acts and not incumbent. It is apparent that the imperative mood consists within it the possibilities of many meanings. (Allamah 'Ubaidullah in his book, *Tawzīḥ* has given sixteen implications of the Imperative mood). They argue that in jurisprudence an act like divorce which, in its origin and effect, is non-incumbent cannot in any case be attached with a condition that would turn the effect and operation of that act as mandatory, and if that condition is, by chance or intention, not adhered to, that act shall, because of such non-compliance be considered not to have occurred at all and of no effect.

⁷⁸Al-Hasnain, Muḥammad: *'All Al-Shī'at wa Usuluhā*, Iran, 7th Ed.

”إلا شهاد على الرجعة وعلى الطلاق يرفع عن النوازل اشكالا كثيرة“

2. Besides, the argument of Shi'ah *a'immah* that "Have two just witnesses from amongst you" is subjoined to "Then divorce them for their period of probation", in the beginning of the verse is at variance with the usual linguistic arrangement (*naẓm*) of the Qur'ān. Allah in this verse has, in respect of divorce, given the directive that the divorce whenever it be pronounced ought to be pronounced : (a) with respect to the time of probation, and (b) the woman ought not be turned out of the houses, nor the woman on their own account should leave the houses, except when they become openly transgressors (unchaste). It is, thereafter, said that it is the limit prescribed by Allah; whoever crosses this limit shall be cruel to himself. The directive about divorce ends here. Allah, on this directive, now adds another directive. He says that at the near completion of the term of probation of the women, retain them equitably or give up the opportunity of having recourse to them and (on this) have two witnesses. That is to say, there are two sentences: one is with respect to divorce and the other is with respect to the retention or non-retention of the women near completing their term of probation. Hence the sentence "Have two just witnesses from amongst you" is subjoined to *Imsāk* (keeping back) or *Mufāriqat* (separation), and not to divorce, which is referred to in the beginning of the verse. Here *Mufāriqat*, that is, separation has unanimously been taken to mean giving up the opportunity of retaining by having recourse to them, which is an act quite distinct from and later to divorce. Shi'ah *a'immah* consider that the last sentence "Have two just witnesses from amongst you" directly concerns *Fatalliḡūhunna* (then divorce them) which occurs at the beginning of the verse. This will be against the usual syntax of the Qur'ān. The directive about divorce in the verse takes precedence and the directive about witnesses has no concern with divorce. It has justly been placed much later. Further the letter *fa* (ف) in "*fa izō balaghna* (when these women are about to reach the completion of their period of probation) has been introduced with the purpose of *tafri'* (effect and consequence). Hence, incumbency of evidence may, at least, be in connection with "*fa Amsikūhunna*" retention and *fāriḡūhunna* (separation) and not concerning "*fa talliḡūhunna*".
3. The third argument of Shi'ah jurists is that the directive in making the evidence for divorce incumbent is for the purposes of avoiding

disputes and, in the event of denial, for providing proof. If this be taken to be correct, to have witnesses required for a contract of marriage, according to them, should also be made incumbent for the marriage contract taking effect, as therein also lies the possibility of dispute and denial. Moreover, through a contract of marriage the matrimonial alliance is created, whereas through divorce the same alliance is broken off. It is evident that the creation of a marriage contract is a positive and more important event than breaking it off. But the Shi'ah jurists quite inconsistently do not favour the necessity of evidence for a marriage contract.

4. If the presence of witnesses of a divorce be held to be incumbent due to the possibility of dispute and denial and be recognised as an integral part of the law of divorce, the requisiteness of the presence of witnesses shall have to be accepted as a substantive part of the law applicable to other cases of the breach of contract; whereas presence of witnesses, according to no school of law, is a requisite condition for proof of the breach of a contract. Evidence is generally recognised, as a law of procedure, in support and proof of claims and never as an integral part of the substantive law.

Conclusion :

In the light of the above discussion, I come to the conclusion that the presence of two witnesses cannot be held to be such an essential requisite for giving effect to the pronouncement of divorce that in its absence divorce is considered to be null and void and of no effect. It is only desirable.

Indo-Pakistan Law :

Presence of wife : Presence of wife is not necessary for the divorce to be effective. Thus a *ṭalāq* pronounced in her absence would be a valid divorce. (30 Bom. 537; 59 Cal 833). The divorce may be addressed to the wife or to any of her relations but the words should clearly refer to her. (33 Mad. 22; 31 I.C. 730). The knowledge of the wife is necessary for certain other collateral purposes but communication is not necessary for the validity of *ṭalāq*. (PLD 1951 Lah. 467). The collateral matters are : maintenance to which she is entitled till she comes to know of the *ṭalāq* (59 Cal. 833); and limitation for a suit for deferred dower, which begins to run from the time when the divorce comes to her notice. (AIR 1931 Mad. 647; 133 I. C. 375).

Shi'ah Law : Shi'ah Law prescribes a particular formula for the pronouncement of divorce. If that is not employed, divorce would be ineffective. Thus, according to Shi'ah Doctors, the *ṭalōq* must be orally pronounced by the husband, in the presence of two witnesses and the wife, in a set form of Arabic words except where it is established that the husband is incapable of pronouncing the *ṭalōq* in the manner mentioned above. (PLD 1963 S. C. 51; 1963 (1) PSCR 356; 15 DLR S. C. 9). It will be noticed that it is not with regard to proof of divorce that the Shi'ah law insists on two witnesses but to the very act of divorce and therefore the matter does not relate to proof only. It is a part of substantive law. [PLD 1962 (W.P.) Lahore 558; PLD 1965 Kar. 185].

CHAPTER—XII

Delegation of Divorce (Tafwid at Talaq)

Section 105. It is lawful for the husband to delegate to the wife the right of effecting divorce. In that event, however, his own right of effecting divorce shall not lapse.

Explanation: In the event of the husband's delegating to his wife the right of effecting divorce, the wife can pronounce divorce to herself.

COMMENTARY

The meaning of "Delegation of the right of Divorce" is the entrustment with the wife by the husband of the right to act as her husband's delegate in effecting divorce to herself. Hence the wife's making it a condition with the husband, at the time of her being contracted into marriage, that she shall have the authority of effecting divorce to herself is legally valid. Likewise, delegation of authority by the husband to the wife at any time during married life, effecting divorce to herself is also valid. Among other Muslim countries, in Syria too, this right of the wife has been recognised under the Family Laws.¹

If the wife at the time of marriage contract acquires the right from her husband of effecting divorce or she becomes entitled to this right after the marriage contract, she may, by the exercise of this right and effecting divorce upon herself, break off the marital relationship. And this divorce shall be as effective as that pronounced by the husband himself.

Classification :

The Muslim jurists have classified the delegation by the husband of the power to divorce² thus :

- (a) *Tafwīḍ*, that is, delegation ;
- (b) *Tawkīl* or agency; and

¹Sec. 88 :

”للزوج..... ان يفوض المرأة تطليق نفسها“

²Ibn 'Ābidīn, Radd al-Muḥtār, Cairo, 1318 A.H. vol. ii, pp. 487-89.

(c) *Risalah* or messengership,

- (a) *Tafwīd* : The wife to whom the power is delegated exercises it in respect of her own person and has absolute right to exercise the power or not, as she may choose.
- (b) *Tawkīl* ; In *Tawkīl*, the husband appoints an agent to divorce his wife on his (the husband's) behalf. The agent exercises the power delegated to him in respect of divorcing the wife.
- (c) *Risālah* : In *Risālah* the husband appoints a person, his messenger, to convey his message to wife that he has delegated his power of divorce to her (wife). The power given by *Tafwīd* cannot be revoked, but the other two i.e. *Tawkīl* (agency) and *Risālah* (Message) can be revoked by the husband as long as they have not been exercised,

Basis of the Rules :

All the Sunnī schools of law recognise the doctrine of *Tafwīd al-Talōq*. According to them the doctrine of the delegation of the power of divorce is based on an incident mentioned in the Qur'ān wherein the Prophet (peace be on him) told his wives that they were at liberty to live with him or to get separated from him as they choose. Thus it is stated in *Surah Al-Ahzāb* (xxxiii : 28) :

“O Prophet ! say to thy consorts, if it be that ye desire the life of this world and its glitter, then, come, I will provide for your enjoyment and set you free in a handsome manner.”

It is explained by the Muslim jurists that the Prophet (peace be on him) had, in obedience to the above injunction of the Qur'ān, empowered his wives to choose between living with him or a separation : that they might either get their marriages dissolved or choose their continuation. 'Ā'ishah has explained that we (the wives) chose the Prophet (peace be on him), that is, we preferred the continuation of the marriages, and so the marriages were not dissolved. It is inferred from this Tradition that a husband can lawfully delegate to his wife the power to dissolve the marriage, if she so chooses.

Shi'ah Law : The *Shi'ahs* do not recognise the doctrine of delegation of the power of divorce by the husband to his wife. Amir Ali in his noted work, *Muhammadan Law*, (vol. ii, p. 457, Lahore, 1965 A. D.) states, “Although under the Shi'ah doctrines, an option given to the wife has no effect, nor is a conditional *ṭalāq* valid, express authority may be reserved to the wife to dissolve the contract on breach of any of its stipulations.”

Indo-Pakistan Law : A husband may delegate to his wife the power to divorce herself because it is quite in the power of the parties to prescribe conditions upon which the marriage will take place, provided the conditions or the contingencies on which divorce can take place be reasonable and not opposed to the policy of *Shari'ah*. When such an agreement is made the wife may, after the happening of any of the contingencies, repudiate the marriage to the same effect as if a *talāq* had been pronounced by the husband. It is not necessary that she is to exercise that right in the presence of the husband or in the presence of witnesses. [PLD 1967 Dacca 421; 17 DLR 623; PLR 1966 Dacca 1144 (Diss: 53 CWN 302)].

Capacity :

Husband's Capacity : A delegation to be valid must fulfil certain requirements. The husband must possess the same qualifications when delegating the power of divorce to his wife as in the case of pronouncing divorce himself. He should be major and sane in order to be competent to lawfully delegate his power of divorce to his wife or to another person.

Wife's Capacity : Under the *Hanafī* law, the wife to whom the power of divorce is delegated need not be major or sane.³ But she cannot exercise the said power unless she is sane and major for the purposes of Muslim law. The Shafi'is differ from the *Hanafīs* in this respect. Thus, under the Shafi'ī law the power of pronouncing divorce cannot be delegated to a minor wife.⁴ The Hanbalis do, however, agree with the *Hanafīs*. Under the Hanbalī law the power to divorce can be delegated to a minor wife if she is possessed of understanding to such an extent that she can understand what is meant by divorce. If she cannot so understand, the power cannot be delegated to her.⁵

Indo-Pakistan Law : It is obvious, that if the wife herself wants to settle the terms with her husband then she should be major as understood by Muslim Law. If the wife be minor then her guardian can settle such terms with the husband on her behalf and she shall be entitled to the benefit of these conditions, even though she was not a party to the agreement. (*Marfat Ali Mirza v. Jabeedunnessa Bibi* A. I. R. 1941, Cal. 657).

Kinds of Delegation (*Tafwīḍ*) :

There are two ways of delegation of the power of divorce. Either it is restricted in time so that it has to be exercised within the time stipulated

³Ibid p. 494.

⁴Muḥammad b. 'Abī'l-'Abbās : *Nihayat al-Muḥtāj*, Cairo, 1938 A. D., vol. vi, p. 428.

⁵Ibn Qudamah : *al-Mughnī*, Cairo, 1368 A.H. vol. vii, p. 145.

or it is unrestricted by time i.e. for an indefinite period to be exercised as and when the wife may choose. But, if the delegation of the right be for a fixed period and that period expires, the right of the wife shall, then, become void and ineffective.

A woman can thus make it a condition of her marriage that the husband should delegate the power of divorce to her so that she by exercising it may pronounce divorce to herself whenever she likes, or on the husband's committing breach of the terms agreed upon. Such a divorce pronounced by her will take effect as if it were a divorce pronounced by the husband himself.⁶

Husband's own right subsists : In the event of the husband delegating to his wife the right of effecting divorce, the husband's own right of effecting divorce does not lapse. If the husband delegates his right of effecting divorce to his wife and thereafter himself pronounces divorce to her, the wife's right shall then naturally become void and ineffective. It is thus stated in Radd al-Muhtar that the delegation does not divest the husband of the power of divorce and both he and his wife can exercise the power vested in them.⁷

Ibn Nujaym, while discussing the subject of *Tafwīḍ* or delegation of the power of divorce to his wife, poses a question here as to how can the husband exercise the power of divorce when he has delegated the power to the wife and so made her the owner of the divorce. He then explains, on the strength of *al-Kaḥī*, that what the husband entrusts to the wife is not the ownership of divorce, but only the right to exercise the power of divorce and so he still remains the owner of the divorce. Hence, both the husband and the wife can in appropriate cases effect a divorce. The husband is not divested of this power and he can exercise the power as long as the wife does not divorce herself on his behalf.⁸

Conclusion :

To the present writer, nature of the delegation of the right of effecting divorce is, in fact, an *option* given to the wife for effecting divorce

⁶For full discussion see Ibn Nujaym, op. cit. vol. iii, pp. 335-37;

Ibn al-Humam : *Fatḥ al-Qadīr*, Cairo, 1356 A.H. vol. iii, p. 99;

Ibn 'Ābidīn : op. cit. vol. ii, p. 513; al-Kasānī : *Bada'i al-Ṣanā'i'*, Cairo, 1927 A. D. vol. iii, p. 113. Also see *Mohammad Amin v. Amina Bibi*, A. I. R. 1931, Lah. 134.

⁷Ibn 'Ābidīn, op. cit., vol. ii, p. 497.

⁸Ibn Nujaym : *al-Baḥr al-Rā'iḳ*, Cairo, 1311, A.H. vol. iii, p. 335.

on herself. The giving of an option means offering a chance to his wife who is given the option to pronounce divorce to herself or not, in appropriate circumstances, on her own volition. When the husband, therefore, gives his wife the option of effecting divorce, he rather authorises his wife that she may effect divorce on herself and sever the relationship of husband and wife between them, if she likes. It is evident that the wife, in such circumstances, acts in her own right. It means that the wife too can make use of the husband's right, which is over and above and not in place of that of the husband, as it is in the nature of *Khiyar* (option). This view of the present writer is fortified by the very verse (xxxiii; 28) which is the basis of the right of husband to delegate his divorce to his wife, (viz. the *Āyat al Takhyr*, verse relating to option, *Khiyār*) which has already been quoted above as the basis of the rule of delegation, *tafwīḍ*. That is why the jurists have termed this delegation as *Khiyar al-Talāq* which means that the wife is given *option* to divorce herself if she chooses.

Section 106. The power of pronouncing divorce delegated by the husband to his wife is irrevocable, as an option conferred on her.

COMMENTARY

There is a difference of opinion about the revocability of the authority of divorce delegated by the husband to his wife. The preponderant view, however, is that the husband, after delegation to his wife of the right or option to divorce herself, cannot revoke it, because the wife, then, becomes the owner of the option in her own right.^{8a} She may, in her own discretion, exercise that *option* or not.

Ḥanfī Law :

The power once delegated to the wife cannot be revoked or taken away from her. This rule has been justified on the ground that once a person gives another the option, in the nature of ownership, of a certain thing, then, his power to revoke it is lost and he is no longer competent to cancel it,⁹ as the option is akin to ownership. But if the husband empowers a third person to divorce his wife on his behalf then this power can be revoked at any time before it has been exercised,¹⁰ as it is merely a form of agency.

^{8a}*Fatawa al-Alamgiriyyah* : op. cit. vol. ii, p. 67:

“وليس للزوج ان يراجع فى ذلك بينها عما جعل اليها ولا يفسخ كذا فى الجوهره”

⁹*Al-Kasānī, Badāi' al-Ṣana'i'*, Cairo, 1327 A.H. vol. iii, p. 113.

¹⁰*Ibn 'Ābidīn*, op. cit., vol. iii, p. 489.

Shāfi'ī Law :

Imām Shāfi'ī holds otherwise. According to him the husband can revoke the power (Tafwīḍ) at any time before its exercise by the wife.¹¹

Mālikī Law ;

According to Imām Mālik, the husband cannot revoke the power delegated to the wife but he can do so in the case of Tawkīl, agency.¹²

Ḥanbalī Law :

Under the Ḥanbalī law, the husband can revoke the power whether it is delegated to the wife or to a third person.¹³

Indo-Pakistan Law :

The power so delegated (Tafwīḍ) to the wife is not revocable; she may exercise it even after the institution of a suit against her for restitution of conjugal rights. [PLD 1952 Dacca 385; PLR 1952 Dacca 728; 4 DLR 613; AIR 1936 Lah. 716; 161 I.C. 701; AIR 1964, All. 270 (DB).]

Section 107. The power of pronouncing divorce may be delegated by the husband to the wife either at the time of marriage or subsequent thereto.

Time of Delegation

Explanation. If the power has been conferred before the marriage has taken place, it must be so intended as to take effect after the marriage.

COMMENTARY

Under the provisions of Sunnī law, the option of *ṭalōq* can be delegated at any of the three stages, namely :—

- (a) prior to the marriage; or
- (b) at the time of the marriage; or
- (c) subsequent to the marriage.

Muslim jurists hold that the delegation of the power is perfectly valid at whichever of these stages it be done.¹⁴ The time of delegation does not, under the Muslim Law, affect the validity of such delegation.

¹¹Ibn Rushd, *Bidāyat al-Mujtahid*, Cairo, n.d., vol. ii, p. 60.

¹²Ibid, p. 59.

¹³Ibn Qudāmh, op. cit., vol. vii, pp. 142-45.

¹⁴Ibid. pp. 487-97.

Indo-Pakistan Law :

The Courts, in general, abide by the verdict of Muslim jurists in cases where power is delegated before or at the time of the marriage. But they have differed with them in cases where power is delegated to the wife subsequent to the marriage and have held such delegation to be invalid for want of consideration. It is contended that when an agreement has been executed or the terms have been agreed, inter-alia, conferring option of divorce upon the wife or future wife, before or at the time of marriage with the consent of the parties, it is valid, because the marriage itself is sufficient consideration, and she can exercise this right over and above any other right that is conferred on her by the dictates of the Shari'ah or agreement of the parties. But, according to some decisions of the superior Courts of pre-partitioned India, such an agreement, in the absence of other consideration, is invalid on that account. Thus, where a person had entered into a certain agreement with his wife and a quarrel arose between them and the husband entered into a second agreement with his wife's brother undertaking to carry on the terms of his previous agreement, it was held that the latter agreement was nothing more than a promise, as it was without consideration. (*Abdul Piroj Khan v. Husain Bi*, 6 B. L. R. 728; *Mst. Saddam v. Faiz Bakhsh*, A.I.R. 1920, Lah. 211). The Courts are not, however, unanimous on this point and have expressed different views in different cases.

The Judicial Commissioner's Court of Oudh has distinguished the cases where an agreement is entered into at the time of a marriage and where it is entered into subsequent to a marriage. It has been stated in the judgment that the distinction between the agreement is one of consideration. The marriage itself is a sufficient consideration in the first case, but in the second there would be, as a general rule, no consideration. It implies that as a general rule such an agreement would be invalid. (*Banney sahib v. Abeda Begum*, A. I. R. 1922, Oudh 251; 69, I. C. 778).

The Calcutta High Court has taken a different view and has held that an agreement under which the wife is given an option to divorce herself on behalf of her husband on breach of certain conditions is valid and not opposed to public policy, even when it is entered into subsequent to the marriage. (*Mst. Fatima Khatoon v. Fazal Khan*, A. I. R. 1928, Cal. 303; *Saiduddin v. Lateef-un-Nessa Bibi*, 46, Cal. 141; 48, I. C. 609). In another Calcutta case it was held that such an agreement the conditions of which have been settled before the marriage but executed subsequent to the marriage is perfectly valid. (*Sabed Khan v. Bilat-un-Nisa Bibi*, 30 C. L. J. 510).

The Lahore High Court has also held such subsequent delegation to be valid and not opposed to public policy. (*Mst. Sadiqa Begum v. Ata Ullah*,

A. I. R. 1933, Lah. 885; *Muhammad Yasin v. Mumtaz Begum*, A. I. R. 1936, Lah. 716; *Sayeeda Khanum v. Muhammad Sami*, P. L. D. 1950, Lah. 113). The High Court of Lahore in another case held that there is ample authority to the effect that an agreement made before or after the marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified valid conditions is valid. (*Muhammad Amin v. Amina Bibi*, A. I. R. 1931, Lah. 134).

The Dacca High Court has held that an unconditional delegation of the power of divorce is valid. (*Aklima Khatoon v. Mahib-ur-Rehman*, P. L. D. 1963, Dacca 602).

Conclusion :

It may be submitted that the notion of consideration as expounded by the conceptions of the English law or the Contract Act, 1972 has little to do with the doctrine of the delegation of the power of divorce (*Tafwīd al-Talāq*) which falls within the domain of "Muslim Personal Law of Marriage and Divorce" and it should be left alone to be so determined. [See Muslim Personal Law (Shari'at) Application Act, 1937; West Pakistan Muslim Personal Law (Shari'at) Application Act, 1962].

It may also be noted here that the Dissolution of Muslim Marriages Act. 1939, after enumerating a number of grounds for dissolution of marriages provides that a marriage can be dissolved on any other ground which is recognized as valid for the dissolution of marriage under Muslim Law. A wife can, therefore, dissolve her marriage if she has been given an option termed as "*Tafwīd al-Talāq*" (delegation of the right of effecting divorce), which is a part of the substantive law of the Shari'ah relating to divorce.

Section 108. The delegation of the power by a husband to the wife may either be conditional or without any condition.

Conditional
Delegation

COMMENTARY

There is a unanimous view that the delegation of the power of divorce can be conditional or unconditional.

Conditional Delegation :

The delegation of the power of divorce may be unconditional so that its exercise may be made to depend on the occurrence or non-occurrence of a certain specified contingency. Thus, the husband may authorise the wife to divorce herself if he marries another woman. In such a case, the wife

shall be entitled to exercise the power only when he marries another woman.¹⁵ Similarly, he may authorise the wife to divorce herself if a certain condition agreed between the parties as regards maintenance is breached¹⁶. It is, however, necessary that she should not have contributed to the breach of the condition by the husband. Thus a husband who authorised his wife to effect divorce to herself on his failure to maintain her for a specified period of time failed to do so. But his failure was due to the fact that the wife had refused to live with him without any just cause. In such situation, the wife is not entitled to exercise the power as she refused to live with him, thus becoming disentitled to be maintained by the husband.

Indo-Pakistan Law :

The pronouncement of divorce by the wife amounts to her husband's pronouncing it. There is no difference between a husband agreeing that he shall be held to have divorced his wife when a certain contingency arises and a condition allowing the wife to divorce herself upon a certain contingency arising. (*Muhammad Amin v. Amina Bai*, A. I. R. 1931, Lah. 134).

The delegation of the right of divorce can be conditional or unconditional and even unconditional delegation of the right to divorce is legal. (PLD 1963 Dacca 602).

Valid and reasonable conditions :

The following conditions were held to be valid and reasonable, and where there was an agreement that the wife would have the power to divorce herself if they were not fulfilled, it was held to be binding on the parties:—

- (a) The husband should not beat or ill-treat his wife or if he oppresses her wrongfully she will be entitled to reside at her father's house and realise maintenance allowance from him. (PLD 1952 Dacca 385).
- (b) The husband should allow his wife to be taken to her father's house four times a year. (8 Cal. 327); or that if the wife be in need of going to and coming back from her father's residence he would send her there and bring her back at his own expense. (PLD 1952 Dacca 385).
- (c) If the husband marries a second wife during the subsistence of the instant marriage. (*Mst. Sadiqa Begum v. Ataullah*, 144, I. C. 497;

¹⁵ *Fatāwa 'Ālamgirriyah*, Kanpur, 1349 A.H. vol. ii, pp. 72-73.

¹⁶ *Ibn 'Ābidīn*, op. cit., vol. ii, p. 493.

A. I. R. (1933), Lah. 885; *Shrimati Ayetunnesa Bibi v. Karamal*, 112, C. W. N. 907; 36, Cal. 23; *Muhammad Amin v. Amina Bibi*, A. I. R. 1931, Lah. 134; *Khalilur Rahman v. Marium Bibi*, 59, I. C. 804; also see 132 I. C. 578; unless she be either barren or permanently sick (PLD 1952 Dacca 385).

- (d) If the husband by his conduct gives the wife or her parents or relatives mental torture. *Shrimati Samserannessa v. Abdus Samad*, A. I. R. 1926, Cal. 1114; 93 I. C. 1018).
- (e) If the husband does not lead a respectable life, does not earn his livelihood and does not live in a house approved by the wife and her parents. (*Muhammad Yasin v. Mumtaz Begum*, A. I. R. 1936, Lah. 716).
- (f) If the husband fails to deliver certain ornaments agreed to be given to the wife on a demand by her. (*Nuruddin v. Mst. Chenuri*, 3, C. L. J. 49; *Tahazzad Hossain Sikdar v. Hossenara Begum*, P. L. D. 1967, Dacca 42).
- (g) If the husband keeps a concubine. (*Meer Ashraf Ali v. Meer Ashad Ali*, 1871, 16 W. P. 260).
- (h) If the husband fails to pay separate specified maintenance to the wife in case of disagreement between the parties. [*Mirjan Ali v. Mst. Maimuna Bibi*, A. I. R. 1949 Assam 14; *Buffatan Bibi v. Sheikh Abdul Salam*, A. I. R. 1950, Cal. 304; *Muhammad Muinuddin v. Mst. Jamal Fatima*, A. I. R. 1921, All. 152; *Mst. Hamidan v. Muhammad Umar*, A. I. R. 1932, Lah. 65; *Syed Abbas Ali v. Nazeem-un-Nessa*, 43, C. W. N. 1059; also see *Muhammad Yasin v. Khushnuma Khatun*, Karachi Weekly Law Reports, vol. ii 1961 p. 29 (D.B.)]
- (i) If the husband does not pay the wife an agreed sum of money while she is living with her parents. (*Mst. Sakina Faruk v. Shamshad Khan*, A. I. R. 1936, Pesh. 195).
- (j) If the husband does not pay maintenance to the wife even if she does not reside in the house with him and his second wife. (*Mansur v. Mst. Azizul*, A. I. R. 1928, Oudh 303).
- (k) If the husband does not continue to pay to the wife an adequate or specified subsistence allowance when the relations between the parties become strained. (*Muhammad Ali Akbar v. Fatima Begum*, A. I. R. 1929, Lah. 660; *Mst. Bufatan Bibi v. Shaikh Abdul Salam*, A. I. R. 1950 Cal. 304; *Mst. Hamidan v. Muhammad Umar*,

A. I. R. 1932, Lah. 65; *Sakina Faruk v. Shamsad Khan*, A. I. R. 1936 Pesh. 195). But a different view has been taken in some other earlier cases. (*Bai Fatima v. Ali Mohammad Aiyub*, I.L.R. 37, Bom. 280); This case has been dissented from in *Mohammad Zaman v. Irshad Begum*, PLD 1967, Lah. 1104). *Imam Ali Patwari v. Arfatunnessa*, A. I. R. 1914 Cal. 369; A. I. R. 1916 Cal. 223 (D.B.). The Calcutta High Court has explained in a later case that there is nothing in Muhammadan Law opposed to an agreement which does not allow the wife to deny her husband's conjugal rights but permits her, when ill-treated, to leave her husband's house or insist on those rights being exercised in her parents' residence. (*Sabed Khan v. Bilatunnessa Bibi*, A.I.R. 1919, Cal. 825).

- (l) If the husband leaves the wife without making any provision for her maintenance or if the husband treats the wife habitually in a criminal manner, or if the husband fails to perform the marital duties and obligations: (*Khalilur Rahman v. Mariam Bibi*, 59, I. C. 804).
- (m) If the husband does not pay to the wife her prompt dower on demand. (*Hamidoollah v. Mst. Faizunnessa*, I. L. R. 8, Cal. 327; *Abdul Shakoor v. Mst. Machunna Khatoon*, 7 D. L. R. 451). This holds good even when the marriage has been consummated. (*Gul Nawaz Khan v. Mst. Maherunnessa*, P. L. D. 1965, Dacca 274, also see PLD 1967 Dacca 421; PLR 1966 Dacca 1144; 17 DLR 19; 7 DLR 451).
- (n) If the husband would bring any of his other wives to stay with him without the consent of the wife. (*Saifuddin Shaikh v. Mst. Soneka Bibi*, A.I.R. 1955 Assam 152).
- (o) If the husband assaults the wife (*Muhammad Ali Akbar v. Fatima Regum*, A.I.R. 1929, Lah. 660, *Mst. Bafatan v. Abdus Salam*, A.I.R. 1950, Cal. 304; *Moinuddin v. Jamal Fatima*, A. I. R. 1921, All. 152; *Mst. Hamidan v. Muhammad Umar*, 1952, Lah. 66; *Mst. Sakina Faruq, v. Shamshad Khan*, A. I. R. 1936, Pesh. 195; *Mansur v. Azizul*, A.I.R. 1928, Oudh 303).
- (p) The wife, if a minor, shall live with her parents for a specified period of time during her minority. (*Mst. Mafeesun Nessa v. Bodi Rahman*, 20, I. C. 642; *Marifat Ali Mirja v. Mst. Jabeedun Nessa Bibi*, A.I.R. 1944, Cal. 658).
- (q) The husband shall not take his wife outside her permanent place of residence where they were married. (*Akbar Nessa v. Hussain-uddin*, Deccan Law Reports, Vol. vi, p. 28).

- (r) There is nothing to indicate that delegated right of divorce for non-payment of prompt dower is unreasonable and opposed to the policy of Muslim Law. In such a case as the husband can exercise right of divorce in the absence of wife or in the absence of witnesses, the wife also in the absence of the husband or witnesses can exercise the delegated right of divorce on the happening of specified contingencies. It is not necessary that she is to exercise that right in the presence of the husband or in the presence of witnesses. (PLD 1967 Decca 421; 17 DLR 623; PLR 1966 Dacca 1144 (Diss : 53 CWN 302).
- (s) Where the husband did not pay maintenance to the wife as stipulated in the *Kabinnama*, the wife could exercise the right to divorce herself. (PLD 1965 Dacca 274; 17 DLR 199; 9 DLR 455). But where the *Kabinnama* gave power to wife to divorce herself "if the husband did not give the wife maintenance for two years" and the circumstances of the case showed that it was the wife who was to blame for the husband's failure to maintain, the wife had no right to effect a divorce in exercise of such power. (*Ahmad Ali v. Saleh Khatun Bibi*, PLD 1952, Dacca 385; PLR 1951 Dacca 793; 4 DLR 613).
- (t) It was remarked in a case that the wife would be at liberty to divorce the husband when he committed a breach of the conditions agreed upon. (*Saifuddin Shaikh v. Mst. Soneke Bibi*, A.I.R. 1955, Assam, 153). Here, it seems, the expression 'divorce the husband' was somewhat loosely used as she was to divorce herself by exercising the option delegated to her by her husband.

When exercised :

It has been held by the Calcutta High Court that when the power is given to the wife by the marriage-contract to divorce herself on her husband's marrying again, she is not bound to exercise her option at the very first moment she learns the news. The injury done to her is a continuing one, and it is reasonable that she should have a continuing right to exercise the power. (*Shrimati Ayat un-Nesa Bibi v. Karam Ali*, I. L. R. 36 Cal. 23; 12 C.W.N. 997). Thus, delay in exercising the right of divorce on the happening of the stipulated contingency does not imply a waiver on her part.

Burden of Proof :

When a wife seeks to exercise the power delegated to her to divorce herself she must establish clearly that the conditions under which she was authorised to exercise the power have been fulfilled. (*Mirjan Ali v. Maimuna*

Bibi, A.I.R. 1949, Assam 14; *Buffatan Bibi v. Shaikh Abdul Salam*, A. I. R. 1950, Cal. 304-309).

Section 109. Divorce pronounced by a wife under her delegated authority shall be in the nature of a revocable divorce which may be revoked by her at any time during her 'iddat, unless otherwise intended subject to the provisions of section 106, by the husband at the time of delegation.

Nature of
divorce

COMMENTARY

The nature of separation effected by a divorcee pronounced by a wife, under delegated authority, generally depends on the expression used by the husband and its exercise by the delegatee wife. There is, however, some difference of opinion in this respect among different schools of law as under:-

Ḥanāfī Law :

Imām Abū Ḥanīfah lays down that the separation effected by this exercise of the power of divorce shall amount to an irrevocable divorce. He explains that if it be held to be revocable then it can serve no purpose and the wife gains no advantage from the delegation.¹⁷ The argument seems to be quite sound and purposeful.

Mālikī Law :

Imām Mālik holds that when a husband authorises his wife to divorce herself, he shall be deemed to have empowered her to effect an irrevocable divorce. He explains that in such a case the object of the husband's delegation is that the wife should be separated from him. Her object, when she exercise the power, is to be irrevocably separated from him. Imām Mālik, therefore, concludes that the spouses want to be separated irrevocably and so such shall be the effect of the exercise of the power by the wife.¹⁸

Shafi'ī Law :

According to one report, Imām Shafi'ī holds that the separation effected in the case of delegation to wife amounts to a dissolution of the marriage. But, according to his later opinion, the category of the separation shall be that of divorce and its nature shall depend on the intention of the husband while delegating the power. If he wanted the separation to be effected irrevocably, the divorce effected shall be irrevocable. If, on the other hand, he wanted to delegate power of a revocable divorce, then only a revocable divorce shall result.¹⁹

¹⁷ Ibn Rushd: op. cit., vol. ii, p. 60.

¹⁸ Ibid.

¹⁹ Ibid.

Modern Legislation :**Jordan :**

The Jordanian Law of Family Rights, 1951, authorises a women to stipulate with the husband, at the time of marriage, the condition that if he contracts another marriage during the continuance of their marital union, she would have a right to pronounce a 'delegated divorce'. Such a stipulation, will not, however, be enforced by the Court unless it is properly incorporated in the marriage-deed duly registered.

Pakistan :

Under Section 8 of the Muslim Family Laws Ordinance, 1961 in the case of *ṭalōq al-Tafwīd* notice to the Chairman must be given by the wife on the pronouncement of divorce by her.

The Supreme Court of Pakistan commenting on the Ordinance stated that the sphere of attempted conciliation also seems to be further extended by this section of the Ordinance to cases of "*Talōq al-Tawid*" and also to other forms of dissolution of marriage at the instance of either party, *mutatis mutandis*, and this throws further light on the object of the Ordinance. (PLD 1963 Supreme Court 51; 1963 (1) PSCR 356; 15 DLR S. C. 9). It appears that this section applies to only those modes of dissolution in which the parties may dissolve the marriage by their own act without the intervention of the Court. In the case of "*Talōq al-Tafwīd*", the wife, on exercising her option of *Talōq al-Tafwīd*, must send a notice to the Chairman, who would try to effect reconciliation between the parties through the Arbitration Council. The procedure as laid down in Section 7 of the Ordinance, as far as possible, shall apply. Consequently, the divorce under delegated authority is not to be irrevocable and the conciliation proceedings shall also take place.

Further, the *nikahnama* which has been prescribed by the Provincial Governments for purposes of registration of marriages under section 5 of the said Ordinance also makes provision for the right of *ṭalōq* to be delegated to the wife by the husband at the time of marriage, if agreed. This has made things easy and convenient for both the parties.

Conclusion :

To conclude, the traditional Muslim Law recognises the delegation of the power of effecting divorce by a husband to his wife. According to Hanafis and Malikis it is an irrevocable divorce; but under section 8 of the Ordinance, the divorce shall nevertheless be revocable by consent of the parties.

CHAPTER—XIII

Ineffectiveness of Divorce

Section 110. In addition to the cases referred to in sections 111 to 115, the pronouncement of divorce by persons not competent to divorce, persons noted below shall not take effect:—

1. Minor; 2. Mad; Lunatic; 3. Imbecile; 4. Passed off; 5. Unconscious, 6. Asleep, 7. Delirious; 8. Devoid of the power of perception.

Exception: The guardian of a lunatic or an imbecile person may, on obtaining permission from the Court, pronounce divorce on behalf of his ward to his wife.

COMMENTARY

The basic condition of the competence to the pronouncement of divorce is the husband's accountability for the dictates of *Shari'ah* (i.e. his capability of being held responsible to observe religious duties and the wife's capability of being amenable to be divorced.)

Divorce Pronounced by Minor Husband :

The pronouncer of divorce must be major. Divorce pronounced by a minor, though approaching the age of majority, shall not take effect.¹ If the husband pronounces divorce while he is minor and, on attaining the age of majority, maintains the said divorce as operative, yet the divorce shall not take effect,² as he was incapable of pronouncing divorce *ab initio*. Indeed, he may effect divorce anew.

¹Damād Āfandī (d. 1078) : *Majma' al Anhur*, Cairo, 1327 A.H. vol. i, p. 384-85; Al-Kāsānī (d. 587 A.H.) : *Bada'i' al-Ṣanā'i'*, Cairo, 1328 A.H. vol. iii, pp. 90-100; Ibn al-Abidīn (d. 1252 A.H.) : *Radd al-Muḥtār*, Cairo, 1256 A.H. vol. ii, pp. 227-28, 238; *Fatāwā 'Ālamgiriyyah*, Maktaba Majīdī, Cawnpore, vol. ii, pp. 140-45; Ibn al-Nujaym (d. 970 A.H.) : *Baḥr al-Rā'iq*, Cairo, 1311 A.H. vol. iii, pp. 263-68; Al-Marghīnānī (d. 593 A.H.) : *Al-Hidāyah* Qur'ān Mahal, Karachi, vol. ii, p. 358; Al-Hillī (474 A.H.) : *Shara'i' al-Islām*, Tehran, Pt. III, p. 205.

²Ibid.

Age of majority : The age of majority in such cases shall be fixed in accordance with the Islamic law, not under the Majority Act, 1875,³ as in force in Indo-Pakistan sub-continent.

Divorce through guardian : According to Sunnī's the guardian of a minor is not entitled to pronounce divorce on behalf of his ward.⁴ Even, according to Sunnī law, the guardian of a major person of unsound mind is not entitled to pronounce divorce on behalf of that person though he has attained the age of majority during his state of unsoundness of mind and that such divorce be in his interest.

Shia'h view : 'Ali al-Khafīf, a modern jurist, writes in his book *Furq al-Zuwāj* that according to Shi'ah Imāmiyah system as noted in *Sharāi' al-Islam* the guardian of a minor is not entitled to pronounce divorce on his behalf as there is a known limit fixed for the prohibition of the pronouncement of divorce by a minor i. e. until he attains majority. But the guardians of persons who are insane or of unsound mind are entitled to pronounce divorce on their behalf. However, the guardian of persons of unsound mind but possessing discriminating faculties are not entitled to pronounce divorce on their behalf. If the person of unsound mind possessing discriminating faculties pronounces divorce, he must, however, obtain the permission of his guardian because he would be taken to be as foolish in the matter of pronouncing divorce as he is taken to be in pecuniary matters.⁵

Divorce by Lunatics :

The person who loses his sanity is called mad or lunatic. According to jurists, that person is called mad who has lost his faculty of discrimination due to craziness, who cannot distinguish between good and evil and who has no power of understanding the effect of his action, whether the deficiencies be from birth or be due to some misfortune or affliction.⁶

³Sec. 2 of the Majority Act, 1875.

⁴Ibn al-Abidin : op. cit. vol. ii, (Kitab al-Talaq); Ali Al-Khafīf : *Furq al-Zuwāj fil Mazāhib al-Islāmiyah*, Maktaba, al-Risālah, Abidin 1958 A.H. p. 59.

⁵Al-Hillī : op. cit. Pt. III, p. 205 ;

”وتوقع زوال حجره غالباً فلو بلغ فاسد العقل طلق وليه مع مراعاة الغيبة ومنع منه وهو بعيد“

‘Ali Al-Khafīf : op. cit. p. 59 :

”اما الشيعة الامامية ان ولي الصغير ليس له ان يطلق عليه ان الحجر عليه نهاية معروفة بخلاف ولي المجنون والمعته فان عليهما ان يطلق عليهما“

⁶Ibn Nujaym : op. cit. vol. iii, p. 89.

Kinds of madness : Madness is of two kinds:—

(a) Continuous Madness.

(b) Periodic Madness.

(a) *Continuous Madness* : The divorce that is pronounced in the state of madness is null and void *ab initio*. A mad person is not capable of dealing with his own affairs. He is like a child who is incapable to understand what his interest is? Hence divorce pronounced by him shall not take effect.⁷

(b) *Periodic Madness* : In case of periodic madness, if divorce is pronounced during the lucid interval it shall be taken to have been pronounced by a sensible person and the divorce shall take effect. The acts of persons, suffering from periodic madness, during their lucid intervals are the acts of sensible persons.⁸ As a sensible person is entitled to act in his affairs as he chooses, so is a person suffering from periodic madness entitled to conduct his affairs during his convalescent period and they will take effect without the sanction of his guardian. The authority of the guardian does not subsist over him during his convalescent period. With the disappearance of the lunacy the impediment is removed and his capability to act independently is revived. Hence, divorce pronounced by him during his lucid interval (convalescent period) shall be effective.⁹ If a lunatic, during his lucid interval, pronounces a conditional divorce and that condition is fulfilled during the period of his lunacy, the pronouncement of divorce shall be effective on the same principle, without taking into consideration the fact of his being a lunatic at the time of the divorce taking effect.¹⁰ When a periodic lunatic be under the fit of lunacy and his faculty of discrimination be under temporary suspension the provisions relating to lunacy shall be applicable to him.¹¹

Basis of the Rule : The jurists have based their view of ineffectiveness of divorce by lunatics on the Holy Prophet's tradition narrated by Abu Hurayrah.¹² The Prophet said, "All divorces are valid except those that

⁷Al-Kasani : op. cit. vol. iii, p. 99 :

"فلا يقع طلاق المجنون والصبي الذي لا يعقل لان العقل شرط التصرف"

Damād Afandī : op. cit. vol. i, p. 385.

⁸Al-Mujallah, Karkhana Tijarat Kutub, Karachi, Section 98 :

"تصرفات المجنون غير المطبق في حال افاقة كتصرف العاقل"

⁹Fatawa Alamgiri, op. cit. vol. ii, p. 144; Ibn al-Abidin : op. cit. vol. ii, p. 437-38.

¹⁰Ibid.

¹¹Al-Kasani : op. cit. vol. iii, p. 99.

¹²Ibid.

are pronounced by children and imbecile persons.”¹³ Though there is some difference between imbecile (*Ma‘ūh*) and lunatic (*majnūn*) person, yet both of them resemble in their want of prudence. Hence most of the traditionists and jurists have quoted this tradition in support of the ineffectiveness of divorce pronounced by imbecile and lunatic persons. Tirmizī, however, maintains this tradition to be *gharīb* (of single source) and says that the narrator of this tradition ‘Atā b. ‘Ajlān is weak and of short memory.¹⁴ Besides, Imām Bukhārī in his *Saḥīḥ* says that this tradition is the averment of ‘Ali in these words: “All divorces are valid except the divorce of an imbecile”.¹⁵

Nasā’ī has narrated another tradition of the Prophet, “Three persons are immune from the responsibility of the dictates of *Shari‘ah*. One is the sleeping person till he is not awake, second is the child till he does not attain the age of majority and the third is the lunatic till he does not regain his senses or does not recover”.^{15a} Hākīm calls this tradition to be *Saḥīḥ* (correct). Ibn Ḥabbān too has narrated this tradition.¹⁶ Imām Bukhārī, however, in his, *Saḥīḥ* has in place of “*Yukbarū*” reported the word, “*Yudrakū*” in this tradition and maintains the tradition to be an averment of ‘Ali.¹⁷ Both the words, however, carry the same meaning in the context.

It is, however, certain that the divorce pronounced by a lunatic shall not take effect except when it is pronounced during his lucid interval, when he is regarded as sane.

Iraqi Law : Under the law of Iraq, *Qanūn al-Ahwāl al-Shakhsīyah*, too, divorce pronounced by a lunatic has been held to be ineffective.¹⁸

¹³Al-Baghawī: *Mishkāt*, Karkhana Tijārat Kutub, Karachi, p. 284.

”كل طلاق جائز الا طلاق الصبي والمعتوه“

¹⁴Tirmizī : *Al-Jami‘*, Karkhana Tijarat Kutub Karachi, p. 192; Ibn Humam ; op. cit. vol. iii, p. 38.

¹⁵Al-Bukhārī ; *Saḥīḥ*, (with, marginal notes by Sindi) Cairo, vol. iii, p. 272 :

”كل طلاق جائز الا طلاق الصبي والمعتوه“

^{15a}Nasai : *Al-Sunan*, Karkhana Tijarat Kutub, Karachi, Pt. II, p. 85:

”رفع القلم عن ثلاثة عن النائم حتى ليستيقظ وعن الصغير حتى يكبر وعن المجنون

حتى يعتل اوفيق“

Baghawī : op. cit. p. 284.

¹⁶Al-‘Asqalanī, Ibn Hajar : *Bulūgh al-Marām*, (Arabic-Urdu) Karachi, p. 223.

¹⁷Bukhārī : op. cit. p. 272.

¹⁸Qanūn No. 188 of 1959 : Sec. 35 (1).

Indo-Pakistan Law :

Minor and lunatic cannot pronounce divorce : Neither a minor nor his guardian can pronounce a divorce on the wife of the minor. (8 A.L.J. 953; 7 I. C. 820). If a minor has repudiated his wife during his own minority and he apporves of it on attaining puberty that would not operate as repudiation. He can only repudiate his wife anew. A mere ratification of the past repudiation is ineffective. But a guardian for marriage can enter into a contract on behalf of the minor relating to divorce, Where a guardian entered into a contract to the effect that wife would be authorised to divorce herself if the husband married another wife, it was held that such a contract was valid and could be enforced. (A I R 1941 Cal. 657; 179 I. C. 326).

Divorce Pronounced by an Imbecile :

The word Ma'tūh is derived from 'Atah. Literally it means "want of prudence". Technically that person is imprudent who is an idiot or imbecile, talks nonsense and utters whatever comes to the tip of his tongue without the capacity to understand it.¹⁹ Divorce pronounced by an imbecile person is ineffective.

Distinction between an imbecile and a lunatic : An imbecile is one who is wanting in prudence, possesses little understanding, talks irrationally and acts foolishly but does not indulge either in abusing or violence. Lunatic is the one who has lost his reason altogether and can make no distinction between good and evil.²⁰

Under section 957 of the *Mujallah al-Ahkam al-'Adliyah*, children, lunatics and imbecile persons have all been classed under a single category of persons having no capability to contract and for all of them the term *Mahjur* (person devoid of the *capability* of acting for self and thus incompetent or legally restrained), has been used.²¹

¹⁹Ibn al-Abidīn : op. cit. vol. ii, p. 437-38; Ibn Nujaym : op. cit. vol. iii, p. 268; Ibn al-Humām : op. cit. vol. iii, p. 38.

²⁰Abn al-Abidīn : op. cit. vol. ii, p. 437.

²¹Al-Mujallah : op. cit. section 957:

”الصغير والمجنون والمعتوه محجورون في الاصل“

”المحجورون الذين ذكرو في المواد السابقة وان لم يعتبر تصرفهم القولى لكن يضمنون حال الضرر والخسارالذين نشاء من فعلهم مثلاً يلزم الضمان على الصبى اذا اتلف مال الغير وان كان غير مميز“ (Sec. 960)

Damād Āfandī : op. cit. vol. i, p. 385.

Ibn al-Humam : op. cit. vol. iii, p. 38;

al-Huquq al 'Āilah of Jordan that person is said to be frenzied who on account of anger or for some other reason loses his power of discretion and does not understand what he says.³²

Divorce pronounced by person asleep :

It is unanimously held that divorce pronounced by person asleep does not take effect.³³

Basis of the Rule : The basis of this religious mandate is the Tradition relating to immunity under which a person asleep has been held to be exempted from being responsible for religious duties till he is awake.³⁴

If a person, while asleep, pronounces divorce to his wife and on awakening is informed by someone that he divorced his wife while asleep and he, on hearing this maintains it and declares it to be valid or operative, the divorce shall not be held valid or effective, in as much as the words of divorce uttered in sleep are unacceptable.³⁵

Divorce by delirious person and the person devoid of the power of perception:

Sometimes, due to illness there occurs temporary mental disorder as in case of delirium. Divorce pronounced in delirium unanimously does not take effect³⁶ in as much as a delirious person cannot be held to be of sound mind. He, at that time, is like a lunatic or imbecile person. Likewise, the heart and mind of a man sometimes become so affected that his power of comprehension gets lost. Such a person, in legal parlance, is said to be devoid of the power of perception. Divorce pronounced by such a person also does not take effect.³⁷

³²*Qanūn al-Ahwāl al-Shakhsīyah*, Iraq, Sec. 35; *Qanūn al-Ahwāl al-Shakhsīyah*, Morocco, Sec. 49; *Qanūn Huquq al-'Āilāt al-Urdunī*. Sec. 68.

³³Al-Kasānī : op. cit. vol. iii, p. 100 ;

”ومنها ان لا يكون معتوها ولا مدهوشا ولا مبرسا ولا سغما عليه ولا نائما فلا يقع طلاق هولاء ما قلنا في المجنون“

Ibn Abidīn : op. cit. vol. ii, p. 438; *Fatawa Alamgiri* : op. cit. vol. ii, p. 144.

³⁴Nasā'ī ; *Al-Sunan*, Majtaba'ī, Delhi; vol. ii, p. 103; Ibn Majah : *Al-Sunan*, Lucknow, vol. i, p. 148.

³⁵Ibn Nujaym : op. cit. vol. iii, pp. 268-69; Ibn Abidīn : op. cit. vol. ii, pp. 438; *Fatawa Alamgiri* : Cawnpore, p. 144.

³⁶Ibid; Al-Kasānī : op. cit. vol. iii, p. 99-100.

³⁷Ibid; Ibn al-Humam : op. cit. vol. iii, p. 38.

Iraqi Law : In Iraq, too, the divorce pronounced by a person, who on account of some trouble or old age or illness has lost his power of discernment, has been held to be ineffective.³⁸

Section 111. Divorce pronounced in intoxicated condition shall not be effective provided that the power of discernment of the pronouncer of divorce must have been lost due to that intoxication and he must have started raving.

Divorce pronounced in intoxicated condition.

Explanation : If someone is forced to use or unknowingly himself uses the intoxicant and he, under the influence of such intoxication, pronounces divorce to his wife the divorce shall not take effect.

COMMENTARY

For intoxication the term *Sakr* is used in Arabic language. *Sakr*, in law, means that state of intoxication in which one loses his capacity of distinguishing between benefit and harm. The person intoxicated is called *Sakrān* and the divorce which is pronounced by an intoxicated person is called *Talaq al-Sakrān*.

Definition of Sakrān : Hanafi jurists have defined *Sakrān* in two ways. According to the first definition, *Sakrān* is that person who cannot distinguish between black and white, good and bad, man and woman.³⁹ The second definition is that *Sakr* is an exhilaration that overwhelms man's prudence and he starts raving.⁴⁰ The first definition is ascribed to Imām Abu Ḥanīfah and the second to Ṣāhibayn (his two illustrious disciples, Imām Abū Yūsuf and Imām Muḥammad). The assertions of the other three Imāms (Mālik, Al-Shafi'ī and Aḥmad b. Ḥanbal) too conform to the definition attributed to Ṣāhibayn and this definition has the approval of later 'Ulama as well.⁴¹

³⁸ *Qanūn al-Ahwal al-Shakhsiyah*, Iraq No. 188 of 1959, Sec. 35.

³⁹ Ibn Nujaym : op. cit. vol. iii, p. 266 :

”السكران هو الذي لا يفرق بين الارض والسماء ولا بين الرجل والمرأة“

Ibn al-Humam : op. cit. vol. iii, p. 40.

⁴⁰ Ibn al-‘Ābidin : op. cit. vol. ii, p. 434 :

”السكر سرور يغلب على العقل فيهزى في كلامه“

⁴¹ Ibid.

Difference of view :

There is difference of views among the jurists over the divorce pronounced in an intoxicated condition being effective.

Hanafī point of view : The view point of Abū Ḥanīfah, Ṣāhibayn and other Hanafi jurists is that the divorce pronounced in an intoxicated condition, occasioned by wilful use of liquor or other unlawful intoxicating substances, with the purpose of bringing on intoxication and thereby enjoying its pleasures, shall take effect. 'Ala al-Dīn al-Kāsānī has opined in his noted book, *Bada'i' al-Ṣanā'i'*, "If an intoxicated person pronounces divorce to his wife when the intoxication has been occasioned by wilful taking of unlawful intoxicating substances, such as wine, the divorce, according to the Prophet's Companions and the 'Ulama in general shall take due effect."⁴² This has been the ruling of Sa'īd b. al-Musayyib, 'Aṭa, Mujahid, Hasan al-Baṣrī, Ibn Shabruma and Sulayman b. al-Harab. Besides, the averments of 'Ali, Mu'awiyah and Ibn Abbas are also narrated in support that the divorce pronounced in such self-induced intoxicated condition is effective.⁴³ According to Uṭhmān b. 'Affan, however, the divorce pronounced in intoxicated condition shall not be effective.⁴⁴ Tahāwī and Karkhī of the Hanafi school of law, too, are not convinced of the effectiveness of divorce pronounced in intoxicated condition.⁴⁵ Besides, Rabi'ah b. Abdul Rahman, Layth b. Sa'd and Ishaq b. Rāhwayh are also against its effectiveness.

The Three Imams' views : According to Mālik, divorce pronounced in intoxicated condition shall not be effective.⁴⁶ There is an assertion of Al-Shafi'i, too, with respect to the ineffectiveness of the divorce pronounced in intoxicated condition. But the final opinion of Al-Shafi'i is to the effect that divorce pronounced in (self-induced) intoxicated condition does not take effect.⁴⁷ According to Aḥmad b. Hanbal, divorce pronounced in intoxicated condition is not effective, when the intoxication is of such intensity that the pronouncer is unable to distinguish between good and evil.⁴⁸

⁴²Ibn al-Humam : op. cit. vol. iii, p. 41; Dāmād Afandī op. cit. vol. i, p. 384.

⁴³Ibn al-Humam ; op. cit. vol. iii, p. 40; Ibn Qudamah Al-Maqdīsī : op. cit. Al-Mughnī, vol. vii, p. 115.

⁴⁴Ibid.

⁴⁵Al-Kasānī: op. cit. vol. iii, p. 99; Ibn al-Humam: op. cit. vol. iii, p. 41.

⁴⁶Ibid.

⁴⁷Al-Haskafi : op. cit. vol. ii, p. 435; Al-Kasānī : op. cit. vol. iii, p. 99.

⁴⁸Al-Maqdīsī, Ibn Qudamah : op. cit. vol. vii, p. 115-16.

The majority of Shafi'ī 'ulama, however, are not convinced of the effectiveness of divorce pronounced in intoxicated condition. The names of Ibn Shurayh and Abū Thawr of the Shafi'ī 'ulama stand out in this respect. Same is said to be the views of Ibn 'Abbās,⁴⁹ Abū Sha'shā, Ta'ūs, 'Ikrama, Qāsim b. Muḥammad and 'Umar Ibn 'Abdul 'Aziz. It is stated that there are too assertions of Ahmad b. Ḥanbal in this respect.⁵⁰ One is to the effect that the divorce shall take effect and the other is to the effect that the divorce shall not take effect. Abū Bakr Khalāl of the Ḥanbalites approves of the first assertion, whereas Abū Bakr 'Abul 'Aziz adopts the second. The second opinion appears to be currently followed by the Hanbalites.⁵¹

Zāhiri's view : The 'Ulama of Zāhiriyyah sect, too, are not convinced of the effectiveness of divorce pronounced in intoxicated condition⁵².

View of Shi'ah 'Ulama : The Shi'ah 'Ulama, too, hold the same view that divorce pronounced in intoxicated condition does not take effect. They also adopt the same argument that intoxication makes one imprudent and his power of determination is put to an end, for the time being. In consequence, the man is deprived of his power of free action and will. His condition becomes that of a sleeping-man, rather worse than that. The sleeping-man, if awakened, becomes conscious, whereas a drunk person becomes so intoxicated that no one can make him conscious as long as his intoxication itself does not abate.⁵³

Zaydiyyah's view : On the other hand, the 'Ulama of Zaydiyyah sect are convinced of the effectiveness of divorce pronounced in intoxicated condition, even though prudence may have failed because of such intoxi-

⁴⁹Bukhārī : *Ṣaḥīḥ*, Kitāb al-Talaq, vol. ii, p. 793; Ibn al-Humām : op. cit. vol. iii, p. 40.

⁵⁰Al-Saḥnūn : (d. 240 A.H.) *Al-Mudawwanah al-kubrā* (Malikī *fiqh*); Ibn al-Qayyim : *Zād al-Ma'ād*, Cairo, 1369 A. H. vol. iii, p. 40; Ibn al-Humām : op. cit. vol. iii, p. 40.

⁵¹Ibn al-Qudamah al-Maqdisī : *Al Mughni*, vol. vii, p. 115.

⁵²Ibn Hazm, Abū Muḥammad (d. 456 A.H.) : *Al-Muhalla*, 1352 A.H. Pt. x :

“و طلاق السكران غير لازم”

⁵³Muhammad Idrīs, Shaykh : *Al-Sarā'ir*, Iran, p. 237 :

“فان طلق الرجل امراته وهو زائل العقل بالسكر او المجنون وما اشبهان كان طلاقه

غير واقع”

Al-Hilli : op. cit. p. 205.

cation except when the wine is in *shari'ah* permissible as medicine where-upon such divorce shall not be effective.⁵⁴

Ibn Taymiyah's view : Ibn Taymiyah is thoroughly convinced of the ineffectiveness of divorce pronounced in an intoxicated condition.⁵⁵ His disciple Hāfiz Ibn al-Qayyim is also of the same view.⁵⁶

Later view : Among the later 'Ulama, however, there is one group whose view is that in the event of intoxication, caused by some lawful drink or by the use of medicine or by a man getting intoxicated under compulsion, the divorce pronounced by him shall not take effect and his pronouncement of divorce shall be null and void.⁵⁷

Argument against effectiveness : Those who are convinced of the ineffectiveness of divorce pronounced in intoxicated condition support their view with the argument that at the time of pronouncing divorce discretion being non-existent and prudence being an essential condition of the capacity to enter into deal, its non-existence in him at the time of pronouncing divorce would make the divorce ineffective, in the same way as the divorce pronounced by a lunatic and by a child due to their want of discretion.⁵⁸

To support the contention that divorce pronounced in an intoxicated condition is not effective, Al-Shafi'ī, Ṭahāwī and Karkhī advance the following arguments :

- (1) By taking wine the brain is benumbed, on account of which a person loses his discretion. As the divorce pronounced by an insane person or child is ineffective due to their want of prudence,

⁵⁴Abdullah b. Maftāh, Shaykh (d. 877 A.H.) : *Al-Muntazī al-Mukhtār* Cairo, 1352 A.H. vol. ii, p. 352 :

”وان السكران ولو كان زائلاً العقل فان طلاقه غير واقع في الاصح، وهو قول الجمهور من العلماء، واذا ابيح له الخمر لا يقع طلاقه“

⁵⁵Ibn Taymiyyah (d. 728 A.H.) : *Al-Ikhtiyār al-Ilmiyyah*, p. 150.

⁵⁶Ibn al-Qayyim : (d. 751 A.H.) : *Zād al-Ma'ād*, Cairo, 1369 A.H. vol. iv, p. 40.

⁵⁷Ibn al-Humām : op. cit, vol. iii, p. 41 :

”والحاصل ان السكر يسبب مباح كمن اكره على شرب الخمر والا شربة الا ربعة المحرمة او اضطر لا يقع طلاقه“

Al-Haskafi : op. cit; vol. ii, p. 435; Al-Marghinānī : *Al-Hidayah*, Delhi, vol. ii, p. 338; *Fatāwā 'Ālamgirīyyah*, Cawnpore, vol. ii, p. 145.

⁵⁸Al-Kāsānī : op. cit, vol. iii, p. 99; Ibn al-Nujaym : op. cit, vol. iii, p. 266.

so should be the divorce pronounced by a person intoxicated by wine ineffective.

- (2) Divorce pronounced in intoxication caused by henbane (black seed, *banj*) does not take effect. But same is the effect of both the henbane and the wine.
- (3) When apostasy committed during intoxication is not valid, the pronouncement of divorce in intoxication should all the more be invalid.⁵⁹
- (4) The condition of an intoxicated person is worse than the condition of a person who is asleep; because the one who is asleep when awakes, regains his senses, as against an intoxicated person, who does not regain his senses until the effect of intoxication is not over.⁶⁰ Thus when the divorce pronounced during sleep is ineffective, the divorce pronounced in intoxication should all the more be held ineffective.

The Hanafis' Refutations : The Hanafis' refutations against the above arguments may be summarized as follows :—

- (1) A child's action cannot be a correct analogy to those of an intoxicated person. A child is not legally responsible for breach of law. So also he cannot because of minority pronounce divorce.
- (2) The henbane (black seeds = *banj*) is not an unlawful substance. So its taking is not forbidden; hence divorce pronounced under its intoxication shall not be effective.
- (3) The ratio decidendi for holding divorce pronounced during intoxication as effective is that it is done by way of punishment and is not comparable to apostasy during intoxication. It is a presumption that a Muslim continues to be ennobled with the honour of Islam unaffected by apostasy during intoxication. The use of wine is on the other hand a resistable human weakness and punishable as such by upholding divorce pronounced under its influence. The absence of discretion under intoxication is real but a presumption to the contrary is raised in cases of divorce.

⁵⁹Al-Kasani op. cit. vol. iii, p. 99 :

”وجه قولهم ان عقله زائل والعقل من شرائط اهليت التصرف (لإذ كرنا) ولهذا لا يقع طلاق المجنون والصبي الذي لا يعقل والذي زال عقله بالبنج والدواء كذا هذا والدليل عليه انه لا تقع ردتة فلان لا يصح طلاق اولى“

Al-Haskafi : op. cit. vol. ii, p. 435.

⁶⁰Ibn al-Humām : op. cit. vol. iii, p. 40.

Contentions for effectiveness : Contentions generally advanced for effectiveness of divorce under intoxication may be summarised as under :—

1. A person in intoxicated condition remains subject to religious dictates; hence his pronouncement of divorce shall be as reliable as is his liability to religious punishment in the event of his committing sin.
2. Divorce pronounced in intoxicated condition shall be held effective as punishment.
3. A cause must have its legal effect and so a pronouncement of divorce, even during intoxication, must be fully effective.
4. In the opinion of some noted Companions the words of an intoxicated person are as effective as that of a person in his senses. If an intoxicated person can be held responsible for slander, as is the case, he can equally be held to have effectively divorced his wife.
5. A *ḥadīth* of the Prophet is reported to the effect “the (effects of) divorce cannot be held in abeyance.”^{60a}
6. There is another tradition, “Every divorce is valid except that of an imbecile person^{60b}. Hence, divorce pronounced in intoxicated condition is also valid.
7. The Companions of the Prophet considered such divorce to be valid. Abū ‘Ubaidah states that a person, in intoxicated condition, pronounced divorce to his wife. The case was taken to Caliph ‘Umar. Four women gave evidence of the pronouncement of divorce. ‘Umar got separation effected between the husband and wife. Amīr Mu‘awiyah too holds the divorce pronounced in intoxication to be valid.

Argument of Hāfiz Ibn al-Qayyim : Hāfiz Ibn al-Qayyim in his book, *Zād al-Ma‘ād*⁶¹ discussing the subject of the ineffectiveness of divorce pronounced in intoxicated condition argues that Allah addressing the Muslims in the Qur‘ān says, “You should not go near the prayers when you are in intoxicated condition (that is, Muslims should not say their prayers) till you do not understand that you say.”⁶² This verse proves that

^{60a} “لا فيلولة في الطلاق”

^{60b} “كل طلاق جائز، الا طلاق المعتوه”

⁶¹ Ibn al-Qayyim : *Zād al-Ma‘ād*, Cairo, vol. iv. pp. 40, 41.

⁶² Al-Qur‘ān, Surah *Al-Nisā* (the women) iv : 43 :

“يا ايها الذين آمنوا لا تقربوا الصلوة وانتم سكارى حتى تعلموا ما تقولون”

the words of a person who is in intoxicated condition are unreliable as he does not know what he says. The Holy Prophet once ordered that the mouth of a person, who was admitting the commission of adultery, be smelled, to determine whether his confession be accepted as such. There is also reported an incident of Hamza, uncle of the holy Prophet in *Sahīḥ Bukhārī* that he once killed two camels of 'Alī. The Prophet came there and wanted to reproach him. Hamza who was in intoxicated condition then raised his eyes but cast them down again calling the Prophet to be a slave of his (Hamza's) father. The Prophet went back at once. Ibn al-Qayyim maintains that had these words been of a man who was not intoxicated, they would have occasioned him being held a renegade and an infidel. But Hamza, being intoxicated, was not called to account for them.⁶³

Ibn al-Qayyim recounts the names of those of the Prophet's Companions, their Successors, jurists and traditionists according to whom divorce pronounced in intoxicated condition does not take effect, and recapitulates the arguments that are advanced with respect to effectiveness of divorce pronounced in intoxicated condition and refutes them one by one as under :—

1. The first contention that a person in intoxicated condition also remains subjected to religious dictates is null and void. There is consensus (ijma') on the point that only the person in possession of his senses remains subject to religious dictates. The person who does not understand what he is talking about cannot be held subject to religious dictates. If he is so held, his pronouncement of divorce, in the event of his being forced to drink wine or in the event of his unwittingly drinking wine under the impression of using something else, should also be held effective; although, according to those who are convinced of the effectiveness of divorce pronounced in intoxicated condition as well, the divorce pronounced under the influence of wine taken under compulsion or taken unwittingly shall not be effective. The reply to the contention that the words of intoxicated persons shall be taken as valid, is that the words of those persons alone shall be taken to be valid who are in their senses and understand their own words. Those who do not understand their own words, can neither be asked to do a thing nor they can be asked to desist from doing a thing. So far as the question of awarding punishment for committing other acts of sin is concerned, it is a controversial

⁶³Ibn al-Qayyim's argument regarding the abovesaid incident concerning Hamza is misplaced. The event relates to the time when prohibition against taking wine had not been revealed to the Prophet.

matter and it cannot be advanced as an argument for the effectiveness of divorce pronounced under intoxication.

2. The second contention that the mandate regarding divorce being effective is by way of punishment is, according to Ibn al-Qayyim, a weak one. How can divorce be made effective by enforcing it as punishment? The *ḥadd* prescribed for drinking wine is by itself enough. Legally one has no right to award (a further) punishment by holding such divorce to be effective.
3. The third contention that the divorce is the effect of mere pronouncement, cannot be said to be correct, because it necessarily follows from it that the pronouncement of divorce by a person made forcibly drunk or by a person unwittingly using wine not knowing that it is wine, should also be held to be valid. But admittedly no jurists hold that such divorce is valid and no one of them is prepared to give it the cover of "cause and effect".
4. The statement that the Companions have placed a drunken person in the category of persons having sense is not correct. Abū Muḥammad Bin Ḥazm calls this a weak report. Further, says Ibn al-Qayyim, there is repugnancy in this *Athar* (opinion of a Companion). It prescribes *ḥadd* for a person talking in delirium whereas admittedly this is not so.^{63a}
5. As regards the tradition that "divorce cannot be kept in abeyance" the report is not authentic. And even if it be so, it must relate to a person subject to law being in full possession of senses. It cannot apply to a person who does not understand anything. More-over, this report has been made a basis to hold that a mad and a delirious person and a child can not validly pronounce a divorce.
6. According to Ibn al-Qayyim, the tradition "Every divorce is valid except that of imbecile person" is not correct. Even if it be accepted to be correct, it shall be applicable to the pronouncement of divorce only by the person who is subject to religious dictates. An intoxicated person is he who is devoid of the power of understanding, or is an imbecile, resembling an intoxicated person and

^{63a}It appears that Ḥāfiẓ Ibn al-Qayyim has failed to appreciate the point that Ḥadd punishment has not been prescribed against one's raving; it is against one's slandering another to adultery. The caliph 'Umar, in consultation with other Companions, fixed eighty lashes as *ḥadd* punishment for taking wine. It implies that slandering to adultery even in the state of intoxication is an offence and punishable with eighty lashes.

thus falling under the same category. One group maintains that an intoxicated person is like an imbecile person, destitute of wisdom, who does not understand what he speaks.

7. The last argument of the Hanafis that Companions held such divorce to be effective is repelled by the fact that the practice of the Companions in relation to the divorce pronounced in the state of intoxication has been different. 'Uthman b. 'Affān did not hold such divorce to be effective, whereas 'Umar and Mu'āwiyah held a view contrary to Uthmān.⁶⁴

Intoxication under compulsion : Al-Kāsānī, a renowned Hanafī jurist, on the subject of taking forbidden intoxicating liquor under compulsion, writes, "If a person is made to take forbidden intoxicating liquor under perfect compulsion he shall not be held liable to undergo punishment, provided the compulsion be such that there be strong possibility of losing either his life or limb. The punishment is prescribed for committing sin. The taking of liquor under compulsion is not a sin. If, however, the compulsion is imperfect, such as only the fear of being imprisoned, the *ḥadd* punishment shall become imperative.⁶⁵ Ibn Nujaym, however, has said that the divorce, pronounced in intoxication caused by forbidden matter used under compulsion or under most severe necessity for saving life, shall take effect.⁶⁶ Qādī Khan, on the other, holds that divorce pronounced during intoxication, caused by the use of wine under compulsion or most severe necessity for saving life, shall not take effect. As *ḥadd* punishment is not imperative in case of use of wine under compulsion as well as under most severe necessity for saving life, the pronouncement of divorce shall not be effective.⁶⁷ This view has been adopted by Shaykh Ibn al-Humām in his book, *Fatḥ al-Qadīr*,^{67a} a most famous and recognized commentary on *Al-Hidāyah*. So far as taking wine under compulsion is concerned, this latter view has gained preference.

Thus, according to Hanafis, if intoxication is occasioned by the self-induced (say, voluntary) use of forbidden matter, just for the sake of enjoyment, and that intoxicating matter is used without compulsion, the

⁶⁴Ibn al-Qayyim (d. 751 A.H.) : Zād al Ma'ād, Cairo, 1369 A.H. vol. iv, pp. 40-41.

⁶⁵Al-Kasānī : op. cit. vol. iii, p. 176.

⁶⁶Ibn Nujaym : op. cit. vol. iii, p. 266.

⁶⁷Qadi Khan ; *Fatāwā*, Lucknow, vol. ii, p. 219 :

”والصحيح انه كما لا يلزمه الحد لا يقع طلاقه ولا ينفذ تصرفه“

^{67a}Ibn al-Humām : op. cit. vol. iii, p. 41.

divorce, in the circumstances, shall take effect by way of punishment. One has committed sin by self-induced use of forbidden intoxicating substance, so the divorce pronounced by him shall take effect by way of punishment.

Analysis :

There seems to be three views in respect of effectiveness or otherwise of divorce pronounced in intoxicated condition. They are as follows:—

1. Divorce pronounced in intoxicated condition is effective provided the intoxication is caused by self-induced and voluntary use of a forbidden substance.
2. Divorce pronounced in intoxicated condition does not become effective even though the intoxication is caused by the voluntary use of forbidden matter.
3. Divorce pronounced in intoxicated condition is ineffective when the intoxication is caused by the use of forbidden matter under compulsion, or it is used as life-saving device.

The basis of the first point of view is the use of forbidden substance and the intoxication caused by it; i.e. the voluntary use of intoxicating substance *simpliciter*. On this ground, if the intoxication is caused by the use of some lawful substance or medicine, the divorce pronounced in such condition is held ineffective.

The basis of the second point of view is the effect produced by the use of intoxicating matter. Because of the state and condition resulting from the use of intoxicating matter (though such condition may have been occasioned by the voluntary use of forbidden matter), the divorce pronounced in that state is not held to be effective.

The third point of view, instead of its being based on the use of forbidden matter or the intoxicated condition, is based on the absence of volition and authority of the person concerned. And the directive with respect to divorce being ineffective in the event of its pronouncement in intoxication caused by the use of forbidden matter under compulsion is just by way of an exception.

Conclusion :

After examining these different points of views, the present writer has come to the conclusion that divorce cannot be held to be effective by way of punishment for the use of forbidden matter. To take or drink forbidden matter (as wine) is itself a sin or crime for which punishment under Shari'ah is separately prescribed. Hence holding divorce as punishment is not

supported by the Qur'an, Sunnah or the *Ijma'* of *Siḥabah* (the Companions), and it cannot, therefore, be accepted, as an absolute religious mandate. Rather, behind this mandate there appears to be working those historical forces which were affecting the Muslim society, as the use of wine had then become rampant.⁶⁸

The jurists, who have given the verdict of the divorce pronounced in intoxication being effective, have placed the intoxicated person in the category of a person possessing sense. Moreover, they had before them the problem of putting a stop to the extravagant use of wine, which may be called a social reaction. Otherwise, in view of the differences of opinion among the Companions of the Holy Prophet, no final verdict with respect to the pronouncement of divorce during the state of intoxication being effective can be given.

The effectiveness or ineffectiveness of divorce pronounced in intoxicated condition should, in fact, depend on the circumstances, in which the act of pronouncing divorce is committed. Abū Hanifah, with respect to circumstances, is of the view that the person on account of his intoxication must be in such a state that he may not be able to distinguish between heaven and earth. Whereas, according to Abū Yusuf and Muḥammad the person on account of his intoxication must be in dormant and inactive state of mind and he must have started raving⁶⁹. It may, thus, imply that if the intoxication is light and the person intoxicated is capable of realizing the effect of his action, the pronouncement of divorce by him should be given effect to, but if the intoxication is intense and he be insensible to his environment, the pronouncement of divorce by him should not be given effect to. Hence the question of effectiveness of divorce pronounced in intoxicated state should be examined in the light of the circumstances and the decision of the pronouncement of divorce being made effective should be given after examining the surrounding circumstances of each case and the condition of the intoxicated person.

⁶⁸Al-Haskafi, on the authority of *Fatāwā Bazōziyah*, states "that in our times it is necessary that the punishment be inflicted on drinking wine and the divorce pronounced in the state of intoxication be held effective" (*Al-Durr al-Mukhtar*, vol. ii, Chapter on Talāq al-Sakran).

⁶⁹Ibn al-Humam writes that so far as the definition of *Sakrān* is concerned, the averment of Abū Ḥanīfah relating to punishment and the averment of Ṣāhibayn relating to the pronouncement of divorce has gained preference among the jurists. (*Fatḥ al-Qadīr*, Cairo, 1356 A.H., vol. iii, p. 41; *Radd al-Mukhtar* : op. cit. vol. iii, p. 99).

Modern Legislation :

In Egypt,⁷⁰ Iraq,⁷¹ Jordan,⁷² Morocco,⁷³ Syria,⁷⁴ and Sudan, too, divorce by an intoxicated person has been declared, under modern legislation, to be ineffective. In the law of Morocco, however, the qualifying word "replete" with the word "drunkard" has been used, which signifies that if a man possesses the power of discrimination and can distinguish between good and evil, his divorce may be held to be effective.

Section 112. A Divorce pronounced during death-illness, shall not be effective for the purposes of inheritance provided the husband dies of that illness and within the period of probation of that divorce.

Divorce pronounced during death illness

COMMENTARY

No directive on divorce pronounced in death-illness is found in the Holy Qur'an or in the traditions of the Prophet. It, however, does find place in the traditions and verdicts (fatawā) of a few of the *Sihabah*, (Companions of the Holy Prophet). The jurists while drawing conclusions from these traditions and verdicts have also relied on *Qiyas* (juristic analogy) in formulating rules on the subject.

Definition of death-illness :

The definition of death-illness in section 1955 of *Mujallatul Ahkam al-'Adliya* is given in these words: "Death-illness is that in which the fear of the occurrence of death predominates. If the sick person is a man, he should, due to that illness, be not able to go out of the house on his daily chores. If the sick person is a woman she should, due to that illness, be not able to conduct her household duties. Further, though the person may or may not have remained confined to bed his or her death must have

⁷⁰Qanūn No. 25 1929, Sec. 1:

“لا يقع طلاق السكران”

⁷¹Qanūn Al-Ahwal al-Shakhsyah, Iraq No. 118 of 1959, Sec. 35 :

“لا يقع طلاق السكران”

⁷²Qanūn Al-Huqūq al-Āilah, Jordan, Sec. 68:

“طلاق السكران غير معتبر”

⁷³Mudawwanah al-Ahwal al-Sakhsyah, Morocco, Sec. 49:

“لا يقع طلاق السكران الطافح”

⁷⁴Qanūn al-Ahwal al-Shakhsyah, Syria, 1953, Sec. 85:

“لا يقع طلاق السكران”

occurred during one year of such continuous ill health. If the illness gets prolonged to more than a year, condition remaining the same, without any serious turn or change, it shall be considered that activities of the person are that of a sound person. If the illness gets serious and the condition worsens though the period of one year has not passed the illness since its worsening to the time of the occurrence of death shall be taken to be the death-illness."⁷⁵

In the books of *fiqh*, generally speaking, divorce pronounced during death illness has been presumed to be in circumstances in which the possibility or fear of death preponderates and the man by means of the pronouncement of divorce wishes to debar the woman from inheriting from him.⁷⁶ The definition of death-illness laid down in *fatawā Bazaziyyah* is to the effect that comparatively there be greater possibility of the occurrence of death in that illness than in others, and that illness makes the man so incapable that he is unable to go out of his house on his daily business and perform his essential chores. The extent of illness for woman is that she be incapable of carrying on her household duties. So, the ingredients of death-illness may be summarized as under:—

1. Preponderance of the possibility of the occurrence of death in that illness.
2. Imminent fear of the occurrence of death in that illness in the mind of the sick person.⁷⁸
3. The man or woman, on account of that illness, be unable to perform their daily chores.⁷⁹ For instances, the man is not able to go out of his house and the woman is incapable of performing her household duties.

As an example, jurists have cited that diseases like pthisis (consumption) and paralysis, if progressively worsening, will be classed as death-illnesses and if they are chronic and steady will not be regarded as such.⁸⁰

⁷⁵This definition is in concern with financial matters. It is not generally applied to matrimonial cases.

⁷⁶Damad Affandi : op. cit. vol. i, Chapter on Divorce by Sick." p. 427 : "الحالة التي يصير بها الرجل فاراً بالطلاق... ما يغلب فيها الهلاك أي خوفه"

⁷⁷Ibid, p. 428 (Chapter on *Talāq al-Marīq*).

⁷⁸Ibid, p. 427 (Chapter on *Talāq al-Marīq*).

⁷⁹Ibid, p. 428; Ibn al-Humam : op. cit. vol. iii, p. 155.

⁸⁰Ibn al-Abidin : op. cit. vol. ii, p. 435; Ibn al-Humām : of p. cit. vol. iii, p. 155.

Revocable divorce and death-illness :

The four Imams and other jurists including Shi'ahs agree on the point that if a sick person pronounces revocable divorce to his wife during his death-illness and he dies while his wife is still undergoing her term of probation due on divorce, she shall, in the circumstance, inherit from her husband in as much as the marriage contract on account of the divorce being revocable then subsisted.⁸¹ Ibn Hazm, however, has different view.

Irrevocable divorce and death-illness :

But on the question of wife's inheritance on the pronouncement of irrevocable divorce during death-illness there is a difference of opinion among the a'imma (Doctors of Fiqh).

The Hanafi view: According to Hanafi *fiqh* if a man pronounces irrevocable divorce to his wife during his death-illness and dies in that illness during the observance of her term of probation she shall be entitled to inherit from him whether the divorce be irrevocable or she be thrice divorced. However, if the husband dies after the expiry of her term of probation of divorce, she shall not inherit from him.⁸² It is reported that same is the assertion of Ibn 'Abbās, Ibn al-Musayyib, Ibn Shabruma, Awza'i, Thawrī, Ibrahim Nakh'ī, Hammād, Layth, Ta'ūs and Shurayh. And it is also reported that similar are the views of 'Umar and 'Aishah⁸³

Muhammad Al-Shaybanī in his book, Muwattā has recorded a Tradition from Mālik, "Malik has informed me and Imām Malik says that Imām Zuhri informed him and he has narrated through Talḥa b. 'Abdullah b. 'Awf that 'Abdul Rahman Ibn 'Awf divorced his wife while he was ill. When he died the Caliph 'Uthmān held his wife as his heir, while she had completed her term of probation."⁸⁴ According to Hanafīs the meaning of this tradition is that 'Uthmān had given the decision on inheritance after the completion of the period of probation. It is not clear from this tradition that the death had occurred after the completion of the term of probation. Muḥammad referring to the above narrative asserts that according to him the woman shall be held to be an heir as the husband died during the observance of her term of probation. But if the term of probation is complete before his death she shall not inherit from him.

⁸¹Ibid; Al-Hilli : op. cit. 210.

⁸²Ibn al-Abidin : op. cit. vol. ii, p. 435; Ibn Rushd : op. cit. vol. ii, p. 82.

⁸³Al-Shaybanī : *Muwatta* : op. cit. Talaq al-Mariḍ, pp. 257-58; Ibn Nujaym op. cit. vol. iii, p. 266.

⁸⁴Al-Shaybanī : op. cit. pp. 257-58.

Muḥammad, in support of his assertion, has also cited a case of the period of the Caliph 'Umar. A man pronounced three divorces to his wife during his illness. 'Umar wrote to 'Qāḍī Shurayh that he should allow the woman to inherit if she has been observing her term of probation; if she had already completed her term of probation she was not entitled to any inheritance. To the same effect, Muḥammad writes, is the assertion of Abū Hanifah also.⁸⁵

Al-Sarakhsī in his book, *Almabsūt* writes, "A sick person pronounces three divorces or one irrevocable divorce to his wife. While she is observing her term of probation the husband dies. The *Qiyās* (analogical deduction) is that she should not be entitled to inherit from her husband though she may be held entitled to inherit from him on the principle of *istihsān*. We, however, elect for her entitlement to inheritance because of the consensus of opinion of the *Siḥabah* on the point, as *Qiyas* is never preferable to the consensus of the *Siḥabah*".⁸⁶

Views of Mālik : It is reported from Malik that in all divorces pronounced during a man's illness the woman shall be entitled to inherit, provided the husband dies during that illness.⁸⁷ But in this respect, according to Malik and Layth, however, the widow shall inherit from her deceased husband inspite of her contracting another marriage.⁸⁸

Al-Shafi'i's Opinion : Al-Shafi'i seems to have held two views in respect of divorce pronounced during death illness vis-a-vis inheritance by the wife. According to his former view, the wife shall get inheritance as the husband intending to disinherit is to be regarded in the capacity of an assassin. Hence his action in its result shall prove ineffective for the purpose intended and the wife shall not be deprived of her right. However, at a later stage Al-Shafi'i held that if the husband pronounces irrevocable divorce in his death-illness and dies in that illness, the wife shall not inherit from him, as the marriage then was not subsisting.⁸⁹ The final opinion of Al-Shafi'i is, however, stated to be in favour of 'non-heritance'. Al-Shafi'i, in fact,

⁸⁵Ibid.

⁸⁶Al-Sarakhsī : op. cit. vol. vi, p. 55.

⁸⁷Ṣaḥnūn : *Al-Mudawwanah*, vol. v, p. 33 :

”قال مالك كل طلاق واقع في المرض فالميراث للمراة اذا مات من ذلك المرض و
يسببه كان ذلك لها“

Ibn Rushd : op. cit. vol. ii, p. 82-83.

⁸⁸Ibn Rushd : op. cit. vol. ii, p. 83.

⁸⁹Al-Shīrazī, Abū Ishāq Ibrāhīm al-Firozābadi (d. 476 A.H.) : *Al-Muhazzab*, Maktabah 'Isa, al-Bābi, Cario, 1343 A.H. vol. ii, p. 27 (Shafi'i *fiqh*); Ibn Rushd : op. cit. vol. ii, p. 82-83.

takes the general aspect of such transactions. He is in favour of putting a limit to the transactions of the sick person as they adversely affect the rights of the heirs. Divorce according to him, however, is a matter that is basically different from pecuniary transactions of a man.⁹⁰

Ahmad b. Hanbal's view : According to Ahmad b. Hanbal, Ibn Abi Layla, Ishāq and Abu 'Ubayd, if the husband dies of death-illness, the widow shall inherit from him though her term of probation may have expired, provided she has not contracted marriage with another man.⁹¹ Ahmad b. Hanbal argues that in the event of her contracting another marriage, the wife cannot inherit from her deceased husband. She could have been held to be an heir of the deceased husband on the ground of her being the wife of the deceased. But her contracting marriage with another person intervenes between her and her deceased husband. She cannot, therefore, be held to be the wife of two persons at the same time.

Malik, on the other hand, argues that the pronouncer of divorce, in the circumstances, wants to disentitle the woman from getting her inheritance from him. The intention being sinful must be frustrated. The widow, therefore, in spite of her contracting another marriage, shall be held to be entitled to get inheritance from her former deceased husband.

Shi'ah view : According to Shi'ah Ulama, if the husband dies of death-illness within a year from the date of his pronouncing divorce either revocable or irrevocable, the divorced wife shall inherit from him, provided she has not in the meantime contracted another marriage. If the woman contracts another marriage within that year, her right to inherit from her former husband shall cease.⁹²

⁹⁰Abū Zahra : *Ḥayāt Ibn Ḥozam*, (Urdu Tr.) Lahore p. 653.

⁹¹Damad Affandī : op : cit. vol. i, p. 428; Abu Humām ; op. cit. vol. iii, p. 150; Ibn Rushd : op. cit. vol. ii, p. 82;

Abul Barkat Mujidud Din (652 A.H.) *Al-Muharrar fil Fiqh al-Hanbalī* Matba' al-Sunnat al-Mohammadiya Cairo, 1950, vol i, p. 411.

”وان اباها في مرض موته المخوف متبها بقصد حرمانها.....وعنه (الامام احمد)

ترثه مالم تتزوج“

⁹²Amir Ali, Syed : *Mohammadan Law*, 6th Ed. 1965, vol. ii, p. 353-54; Baillie : *Digest of Mohammadan Law*, vol. ii, p. 343-44; Mohammad Iris, Shaykh : *Al-Sarā'ir*, Iran, p. 337 :

”اذا طلق الرجل امراته وهو مريض فانها يتوارثان مادامت في العدة فاذا انقضت عدتها ورثته ما بينها وبين سنة مالم تتزوج فان تزوجت فلا ميراث لها - و اذا زاد على السنة يوم واحد لم يكن لها ميراث ولا فرق في جميع هذه الاحكام بين ان يكون التولية هي الاولى او الثانية او الثالثة وسواء كان له عليها الرجعة او لم يكن فان الوراثة ثابتة بينها“

If the husband recovers from the illness during which he pronounces divorce to his wife, falls ill again and dies, the woman shall have the right to inherit from him in the event of such recovery, his getting ill again and death all occurring within the period of probation for a revocable divorce.⁹³

Zahiriyyah view : The Zāhiriyyah jurists do not approve of looking for and relating the Qur'anic injunctions to any basic rationale nor they interpret any verse in the light of its objective or motivation but go by plain words and their meanings. Consequently they consider the transactions by a person suffering from death-illness as effective as that of a person in sound health, provided the person is prudent and of sound mind. According to them, in the event of irrevocable divorce pronounced in death-illness, the woman is not entitled to inherit although the pronouncer of divorce might have died in the illness during her term of probation.

Ibn Ḥazm, the great and zealous exponent of zāhirī *fiqh*, writes in his famous book, *Al-Muhalla*, "Divorce pronounced by a person who is ill is like the divorce pronounced by a person who is in sound health. There is no difference between the two. If three or the last of the three divorcesare pronounced by a person who is ill, in all the cases, the woman shall not inherit from him."

Ibn Ḥazm adds further, "The correct position is that the woman who is divorced irrevocably by her husband during his illness, in the same way as one with whom marriage has been consummated, shall not inherit from him. Likewise the woman, who is revocably divorced by the person who is ill and the person before revoking the divorce dies, too, shall not inherit in spite of the fact the person suffering from illness openly declares that he divorced the woman with a view to deprive her from getting inheritance. He commits no sin as the pronouncing of divorce is permissible. Because of this, the inheritance is barred and matrimonial rights become extinct."⁹⁴

Ibn Ḥazm, in pursuance of this principle, proceeds further, "If someone rightly or wrongly is condemned to undergo death penalty and he, in that condition, divorces his wife, she too shall not get inheritance from him as for no obvious reason any distinction can be drawn between the divorces pronounced by such person and other persons."⁹⁵

⁹³Amīr Ali: op. cit. vol. ii, pp. 352-53, Baillie: op. cit. vol. ii, pp. 343-44.

⁹⁴Ibn Hazam : op. cit. Pt. 10, p. 218.

"وطلاق المريض الطلاق الصحيح، ولا فرق مات من ذاك المرض أولم يموت منه فإن كان طلاق المريض ثلاثاً أو آخر ثلاث أو قيل إن يطأها فإت او ماتت قبل تمام العدة أو بعدها، أو كان طلاقاً رجعيّاً فلم يرتجعها حتى مات او ماتت بعد تمام العدة فلا ترثه في شيء من ذلك كله ولا يرثها أصلاً"

⁹⁵Ibid, p. 229.

Analysis :

On the analysis of the differing views of the four Sunnī schools, the Shi'ahs and the Zāhiriyyah, the present writer has come to the conclusion that Zāhiriyya jurists on this question disregard the verdict of *Sihabah* and do not contribute to the views of other jurists that divorce, in the circumstance, is, in fact, pronounced with the intention of disinheriting the woman. According to them the view of these jurists amounts to "over-ruling Canon law on wrong basis." The basis of the Zāhiriyyah rule on this question is that divorce pronounced by a sick person does take effect; hence all its consequences and effects would automatically follow. But the point is that the prudence cannot ensure the validity of all the consequences and effects of divorce. Now suppose a man under sentence of death pronounces divorce. What else can then his intention be except to maliciously disinherit his wife.

The Hanafis and other *A'imma*h and jurists, who uphold the right of woman to inherit even in the event of her being divorced by her husband during his illness, base their argument on the principle that the husband by divorcing his wife in such condition when it is highly probable that he, on account of his death-illness or otherwise, shall die, divorces his wife with the real intention of depriving her of her right of inheritance and of getting any property from him. Jurists call a divorce in such circumstances as *Talaq al-Fār* i. e. divorce by a person who wants to escape his due responsibility to his divorced wife. It is on this ground that, according to them, such pronouncement of divorce shall not be relied upon in matters of inheritance.

Accordingly, when it is proved that the husband divorced his wife during his death-illness without the wife's consent, the wife will remain his heir during her period of probation provided death takes place before its expiry. This opinion of the jurists, in the first instance, is in accord with the assertions of *Uthmān*, *Ali* and *Zaid b. Thābit*. In the second instance, it prevents the adoption of wrong means by the husband for depriving his wife of her inheritance and the people making divorce a tool for escaping God's bidding (inheritance of wife).⁹⁶

Main points : As to the rule with respect to divorce pronounced in illness and with respect to inheritance the main points that have to be kept in view are that the termination of marriage contract must ensue by and on behalf of the husband i. e. the act of separation should be from the husband's side; secondly the illness in which the divorce is pronounced must be the death illness of which he dies, and the right of inheritance must subsist from the time of the pronouncement of divorce till the expiry

⁹⁶*Al-Bayhaqi : Al-Sunan al-Kubra*, Deccan, 1353 A.H. vol. vii, p. 362.

of 'iddat. If the wife herself desires divorce and secures separation from her husband, in that event she shall not inherit from her husband. Her right shall be considered to have lapsed. For example, the wife at her own instance secures *Khul'a* from her husband or under the delegated authority of divorcing herself she pronounces divorce to herself. She shall not, in such events, get inheritance from her husband, inspite of the fact that the husband was suffering from death illness and died during her term of probation in that death illness.⁹⁷

Other probable circumstances of death : On the basis of the principle involved in the case of divorce pronounced by sick person on his death-bed, the divorce pronounced in similar (i.e. death hazard) circumstances as at the time of fighting with a lion, mobilization for active war duties or undertaking a journey to the moon, in which the occurrence of death be highly probable, shall not affect the right of inheritance of his wife.⁹⁸

Apostasy : The general principle involved in case of husband's apostasy is that an irrevocable divorce ensues between the couple. But a basic principle of the law of inheritance in Islam is that the legator as well as the legatee should belong to the same religion. Consequently a wife should be automatically disinherited on the husband's renouncement of Islam. But the jurists place a husband committing apostasy in the category of a person suffering from a fatal illness to be classed as one running away from the responsibility of a legator to his legatee wife. Consequently the wife shall be entitled to inherit from her apostate (legally dead) husband.⁹⁹

Modern Legislation :

In Iraq and Syria too the divorce, pronounced in death illness and in conditions in which the occurrence of death be highly probable, has been held to be ineffective for the purposes of inheritance.¹⁰⁰ The law of Iraq,

⁹⁷Damad Afandī : op. cit. vol. i. p. 429; Ibn Humām : op. cit. vol. iii, p. 152.

⁹⁸Some such instances have been mentioned in Majma' al Anhur, vol. i, p. 428.

⁹⁹Ibn Humām : op. cit. vol. iii, p. 157, vol. iv, p. 392; Damād Afandī : op. cit. vol. i, p. 429.

¹⁰⁰*Qanūn al-Ahwal al-Shakhsyah*, Syria, Iraq, op. cit. Sec. 35 :

”لا يقع طلاق... المريض في مرض الموت او في حالة يغلب في مثلها الهلاك اذا مات في ذلك المرض او تلك الحالة و ترثه زوجته“

Qanūn al-Ahwal al-Shakhsyah, Syria, Sec. 116 :

”...من باشر مبيّان اسباب الميؤنة في مرض موته او في حالة يغلب في مثلها الهلاك طائعا بلارضى زوجة و مات في ذلك المرض او في تلك الحالة والمرأة في العدة فانها ترث بشرط ان تستمر اهليتها للارث من وقت الابانة الى الموت“

however, fixes no time limit (for the husband's death) nor it attaches any condition to it. This is not only unique and different from all accepted schools of fiqh but is also against any rationale. It needs amendment. Indeed, in Syrian law it is specified that the wife at the time of her husband's death must be observing her term of probation and that her capability for inheritance must remain intact. This is in accordance with the Hanafi fiqh.

Conclusion :

The Hanafi rule on the subject is most proper and it shall be expedient to enact law in accordance with it, as has been codified herein this section.

Section 113. Divorce pronounced under real risk of injury to the person who pronounces divorce or to his family shall have no legal effect, provided he had no intention of effecting divorce.

COMMENTARY

In common parlance 'forced divorce' is that which is pronounced by a person under compulsion or intimidation.

Compulsion has been defined by Ḥanāfī jurists thus: "Compulsion is that word or act of a person which forces another person against his will to act in a way the 'person forcing' desires him to act."¹⁰¹

Compulsion—its kinds and effects :

Al-Kāsānī in his famous book, *Badā'i' 'al Ṣana'i'*¹⁰² has elaborately discussed compulsion, its kinds and effects. He writes that compulsion is of two kinds :—

1. Perfect compulsion (*Ikrāh Tām* or *Ikrāh Mulja'ī*).
2. Imperfect compulsion (*Ikrāh Nāqiṣ* or *Ikrāh Ghayr Mulja'ī*.)

Perfect Compulsion : 'Perfect compulsion' is that in which a man finds himself having lost control and quite helpless. In consequence thereof, his volition ceases and his will gets negated. For instance, when there is the threat of being murdered or the threat of some part of the body being amputated or the threat of getting so assaulted that there is risk of losing life. Perfect compulsion is also called *Mulja'ī*¹⁰³ which means that perfect compulsion which forces one to act contrary to one's will.

¹⁰¹ Al-Marghīnānī : *Al-Hidayah*, Delhi, vol. iii, 346.

¹⁰² Al-Kāsānī : op. cit. vol. vii, p. 175-82.

¹⁰³ Ibn Nujaym : op. cit. vol. viii, p. 89.

Imperfect Compulsion : 'Imperfect Compulsion' is that which results in a disappearance of consent and volition becomes vitiated, not defunct. For instance, the threat is such that there is no apprehension of losing either of life or a part of the body e. g. imprisonment¹⁰⁴ etc. This compulsion is also called by jurists *Ghayr Mulja'i*¹⁰⁵ which means that force or compulsion which does not make one to lose complete control over himself so as to act against his will,

Conditions of Compulsion : Al-Kāsānī⁷ has laid down two conditions of compulsion :—

1. The first condition concerns the person from whom compulsion proceeds, and
2. The second condition concerns the person who is subjected to compulsion.

It is thus necessary for the person from whom compulsion proceeds that he must have the power of carrying into effect the given threat and the person subjected to compulsion must have the belief that the person who is threatening shall carry out the threat into effect. In the absence of any of these conditions, compulsion in law shall not be proved. If, however, the nature of the threat be such that it may not be certain whether the person threatening shall carry out his threat into effect, then only a strong presumption amounting to certainty on the part of the person subjected to compulsion shall decide the issue.¹⁰⁶

Compulsion for taking intoxicating and unlawful substance : When a person is made to drink an intoxicant substance under perfect compulsion, *ḥadd* punishment will not be awarded to him.¹⁰⁷ If there be an imperfect compulsion, *ḥadd* punishment shall be incumbent for him. Imperfect compulsion, however, effects no change in the forbidden act being punishable.

As noted above, Al-Kāsānī⁷ maintains the distinction between the effects of 'perfect' and 'imperfect' compulsion as applied to matters of beliefs and actions. He holds that in such matters, if compulsion is perfect the perpetrator is not responsible and if imperfect, responsibility follows. Al-Kāsānī discussing 'divorce under compulsion' writes that divorce is not one of those matters which intrinsically require consent for their being effective. In compulsion what follows is that the will of the person

¹⁰⁴Al-Kasānī : op. cit. vol. vii, p. 175.

¹⁰⁵Ibn Nujaym; op. cit. vol. viii, p. 175.

¹⁰⁶Al-Kasānī : op. cit. vol. vii p. 179.

¹⁰⁷Al-Kasānī : op. cit. vol. vii, p. 178.

compelled becomes non-existent, but the non-existence of the will does in no manner effect the result of pronouncing words of divorce which take effect.¹⁰⁸

Ḥanafī View : According to Ḥanafīs the divorce pronounced under compulsion does take effect inspite of the husband's helplessness. To them the "will" is no condition for the divorce being effective.¹⁰⁹ There is unanimity on this point between Abū Ḥanīfah and Ṣāhibayn. Ṣha'bī, Nakḥ'ī Zuhri, Ibn-Musayyib and Imam Thwri, among the Successors of the Companions of the Prophet, too concur with the view of the Ḥanafīs on this point.¹¹⁰ Ibn al-Qudāmah Maqdisī in his book *Al-Mughni* writes that Abū Qalaba, Zuhri, and Shurayh too concur with the view point of Ḥanafīs.¹¹¹

Mālik, Shfi'ī and Ibn Ḥanbal's View : According to Mālik, Shafi'ī and Aḥmad b. Ḥanbal, however, divorce under compulsion does not take effect.¹¹² According to Mālik and Aḥmad b. Ḥanbal, divorce under compulsion shall not take effect in the event of the compulsion being without any justification. If some religious obligation necessitates the divorce and the compulsion be due to that, then such divorce pronounced under compulsion shall take effect. For instance, a person effects 'īlā' to his wife and the period of abstention ends. The husband legally ought, under the circumstances, to pronounce a divorce then, but he does not do so. If the Qāḍī, in the circumstances, compels the husband and gets the divorce pronounced it shall duly take effect.¹¹³ It is also reported from Mālik that divorce pronounced under compulsion shall duly take effect, if the pronouncer of divorce pronounces it with the intention of the divorce taking effect, as

¹⁰⁸Ibid, p. 182.

¹⁰⁹Al-Kasani : op. cit. vol. iii, p. 100 :

”واما كون الزوج طائعا فليس بشرط عند اصحابنا وعند الشافعي شرط حتى يقع طلاق المكره عندنا وعنده لا يقع“

¹¹⁰Ibn al-Turkmanī (d. 745 A.H.) Jawhar al-Naqi, o. m. o. Al-Sunan al-Kubra, vol. vii, p. 358.

¹¹¹Al-Maqdisi, Ibn Qudamah : op. cit. vol- vii. p. 118.

¹¹²Malikiyya : Sharh al-Kharshi, vol. iii, p. 184 :

”امان اكره على الطلاق فلا يلزمه شيء“

Shafi'iyya : Mughni al-Mūhtaj, vol. iii, p. 289 :

”ولا يقع طلاق المكره“

Hanbaliyya : Al-Mughni, vol. viii, p. 259 :

”ومن اكره على الطلاق لم يلزمه“

¹¹³Ibn Qudamah al-Maqdisī : op. cit. vol. vii, p. 118,

entertaining a certain intention by one is quite a different function from compulsion proceeding from someone else.¹¹⁴

As pointed out above, Al-Shafi'ī holds divorce pronounced under compulsion as ineffective. The followers of Al-Shafi'ī, in this respect, appear to have deviated from him only this much that if the intention of the person compelled is to effect divorce it shall take effect, otherwise not.¹¹⁵

Some Companions of the Prophet and their Successors are also quoted in support of the assertion of the "three 'Aimmah". It is stated about 'Umar b. al-Khattab, 'Ali Ibn Abi Tālib, 'Abdullah Ibn 'Umar, 'Abdullah Ibn 'Abbās, 'Abdullah Ibn Zubayr and Jābir Ibn Sumrah that they were not convinced of the effectiveness of divorce pronounced under compulsion. 'Abdullah Ibn 'Ubayd b. 'Umayr, 'Ikramah, Ḥasan al-Baṣari, Jābir Ibn Zaid, Qādi Şhuryh, 'Ata b. Abi Rabāḥ, Mujāhid, Ṭa'ūs, 'Umar Ibn 'Abdul Aziz, Ibn-'Awn, Ayūb Sukhtayāni and 'Awzā'ī are among the Successors who were not convinced of the effectiveness of divorce under compulsion.¹¹⁶

The Zahiriyyah View : Besides Mālikis, Shafi'īs and Ḥanbalis the Zāhiriyyah, too, are convinced of the non-effectiveness of divorce pronounced under compulsion. Same is the view of Da'ūd b. 'Ali al-Zāhiri. According to Abū Muḥammad Ibn Ḥazm and other jurists of Zāhiri school of *fiqh*, the pronouncement of divorce under compulsion does not take effect.¹¹⁷

The Shi'ah View : Shi'ah Ja'friyyah also agree that divorce pronounced under compulsion does not take effect.¹¹⁸ Najmuddin Al-Ḥillī in his book, *Sharā'ī al-Islām* holding discretion as a condition for pronouncing divorce writes, "Divorce pronounced under compulsion shall not take effect if the following three ingredients are found there:—

1. One who compels another by means of a threat must have the power of carrying out that threat into effect.

¹¹⁴Ibid, p. 119; Ibn Nujaym : op. cit. vol. iii, p. 194.

¹¹⁵Ibn Rushd : op. cit. vol. ii, p. 81.

¹¹⁶Ṣaḥnūn (d. 240 A.H.) ; Al-Mudawwanah al-Kubrā, (Mālikī *fiqh*), Cairo, 1323 A.H., vol. vi, p. 29 :

”انهم كانوا لا يرون طلاق المكره شيئاً“

¹¹⁷Ibn Rushd: op. cit. vol. ii, p. 81; Ibn Ḥazm; op. cit, Pt. 10, p. 202 :

”طلاق المكره غير لازم له“

¹¹⁸Jawāhar al kalam, vol. v, p. 272 :

”لا يقع الطلاق باكره ولا اجبار“

2. There should be strong presumption that the person threatening shall, on the refusal of the person being compelled, carry out the threat into effect.
3. The nature of the threat given to a man must be either injurious to his person or to that of his representative.

It is immaterial whether the threat be of killing, of causing injury, or of abusing or beating. The measure of injury shall be determined according to the status of the person compelled. However, in the matter of compulsion ordinary injuries are of no consequence.¹¹⁹

Zaydiyyah View : The 'Ulamā' of Zaydiyyah sect are also convinced of the non-effectiveness of the divorce pronounced under compulsion.¹²⁰

Basis of the Hanafi's rule :

Traditions : The Ḥanafis, in support of their point of view, rely both on Traditions and *Qiyās*. They quote both the traditions of the holy Prophet as well as of the Companions of the Prophet. In support of the effectiveness of divorce pronounced under compulsion the Ḥanafīs put forth most strenuously the tradition in which the Prophet says : "Marriage contract, divorce, and to have recourse to" are matters of such seriousness where even jesting shall be treated at par with seriousness."¹²¹ This tradition has been reported by Ḥākim on most reliable authority.¹²² The same tradition has also been narrated by Bayḥaqī,¹²³ Tirmizī and others. In some books of Ḥadīth, it is said, the word "al-Itāq" (manumission) has replaced the word "al-Raj'at" (having recourse to) at the end of this tradition.¹²⁴ The gist of the tradition is that if a person uses the words of divorce for his wife even in jest and without the intention of really effecting it, divorce shall duly take effect. The Ḥanafīs' argument is that even the four *A'immaḥ* and the Shi'ī 'Ulamā' agree, on the basis of the above quoted tradition, about the effectiveness of divorce pronounced in jest inspite of the fact that the pronouncer does not so intend. That is to

¹¹⁹Al-Hilli : *Shara'i al-Islam*, Tehran, Pt. iii, p. 206.

¹²⁰Abdullāh b. Maftāḥ Shykh; (d. 877 A.H.), *Al-Muntazī al-Mukhtar*, Cairo, 1332 A.H. vol. ii, p. 382 :

”ان المكره لا يقع طلاقه عندنا“

”ثلاث جدهن جد وهز لهن جد النكاح الطلاق والرجعة“¹²¹

¹²²Ḥākim: *Al-Mustadrak*, Hyderabad Deccan, 1340 A.H., vol. ii, p. 198.

¹²³Bayḥaqī : *Al-Sunan al-Kubra*, Hyderabad Deccan, vol. vii, p. 341.

¹²⁴Al-Kasanī : op. cit. vol. ii, pp. 99-100; Ibn Nujaym : op. cit. vol. iii, p. 264.

say, though the jester by the use of the words of divorce, does neither intend to effect divorce nor consents to it and does not mean by those words any thing else except jest, yet the divorce pronounced by the jester takes effect. Hence divorce under compulsion should all the more be held to have taken effect, specially because there is in it the intention to this extent that the pronouncer of divorce, inspite of having the option of abstaining from using the words of divorce, wilfully does utter them. Further elaborating their argument on the strength of the above tradition the Ḥanafīs point out that the utterance of the words of divorce as well as the element of positive intention evidenced by not refraining from using those words inspite of such option, are identical in the case of divorce pronounced in jest as well as that under compulsion.¹²⁵ Consequently, according to Ḥanafīs, if a person is compelled to pronounce divorce to his wife and he, under fear of receiving injury such as beating or being put into prison, utters the words of divorce, the divorce shall take due effect.¹²⁶

To support their point of view, the Ḥanafīs quote another tradition of the Prophet (peace be on him) narrated through Muḥammad al-Shaybānī which is also reported by Ibn Hūmam in his book, ‘Faṭḥ al-Qadīr’:¹²⁷ “Muhammad on his chain of narrators narrated from Ṣafwān Ibn ‘Umru Ṭā’ī that a woman had enmity with her husband. She once found her husband asleep. She got upon his chest with a dagger in her hand, shook him to wakefulness and said, “Divorce me thrice, otherwise I will cut your throat”. The husband reminded her of God. She listened him not. The husband, thus compelled, pronounced three divorces. Thereafter, he betook himself to the Prophet and inquired about it. The Prophet stated; “lā-qaylūlatah fi’l Ṭalāq”¹²⁸ i. e. there is no abeyance in the divorce. It meant that the Holy Prophet held that divorce to be effective.

The Hanafīs, in course of arguments, also rely upon the reports about the Companions of the Prophet. It is recorded by Ibn Humām that ‘Umar said, “There are four vague yet effective declarations that cannot be rebutted: Marriage contract, divorce, manumission and gift”.¹²⁹ Bayhaqī, too, has

¹²⁵Ibn al-Humām : op. cit. vol. iii, p. 39; Babarti, Ibn Mahmūd : *Ināyah*, on margin of Faṭḥ al-Qadūr, Cairo, 1356 A H., vol. ii, p. 39.

¹²⁶Ibn Nujaym: op. cit. vol. iii, pp. 263-64; Al-Marghinanī : *Al-Hidayah*, Dēlhi, vol. iii, p. 338.

¹²⁷Ibn al-Humām : op. cit. vol. iii, pp. 39-40.

¹²⁸“لا قيلولة في الطلاق”

¹²⁹Ibn al-Humām, op. cit. vol. iii, pp. 39-40 :

“اربع مبهمات مقننات ليس فيهن رد: النكاح و الطلاق، و العتاق و الصداقه”

narrated this tradition of 'Umar but the word of "Mubhamāt"¹³⁰ (vague) does not occur in his narrative. In the above-noted tradition of 'Umar, the meaning of the word, "Muqaffalāt" in Al-Zamakhsharī's book, "*Al-Fā'iḡ fi Gharīb al-Ḥadīth*" has been given thus, : "There is no way out of the effect created by these matters."¹³¹ That is to say, after using the words they get "locked in". Sanctions shall, therefore, follow the utterance of those words.

Bayhaqī narrates through 'Abdul Malik Ibn Qudāmah an incident of the time of Caliph 'Umar : "A certain person, during the caliphate of 'Umar, used to bring honey from a mountain region. While the man was once hanging with the help of a rope at the edge of the valley for getting honey, his wife got on the top of the rock and asked him to pronounce three divorces to her, otherwise she would cut off the rope. The husband, reminding her of God, asked her not to do so. The woman did not listen to him. Thus compelled, the husband pronounced the three divorces asked for. He having come back from the place, betook himself to the presence of 'Umar and narrated to him the incident. 'Umar separated the woman from him."¹³²

Qiyas : In connection with the divorce pronounced under compulsion being effective the argument of Ḥanafīs based on *Qiyas* is that the person compelled is normally bound by religious dictates. He does understand the pros and cons of the dictates and also recognises their effect and outcome. Hence his utterance of the words of divorce must produce proper religious effect. The person, who is to pronounce divorce, has his own volition involved in its pronouncement, which is the basis of the divorce becoming effective, even though he may not be agreeable to that divorce becoming effective. However, he has the option to choose between the two injuries:

¹³⁰Bayhaqī : op. cit. vol. vii, p. 341.

¹³¹Al-Zamakhshari (d. 538 A.H.) : *Al-Fā'iḡ*, Hyderabad Deccan, 1324 A.H. vol. ii, p. 180.

¹³²Bayhaqī : op. cit. vol. vii, p. 357.

"قال ابو نصر عمر بن عبدالعزيز بن قتادة حدثنا ابو العباس محمد بن اسحاق بن ابوب الصبغى نا الحسن بن على بن زياد ، ثنا ابن ابى اويس حدثنى عبدالمك بن ابراهيم بن حاطب الجمعى عن ابيه ان رجلاً تدلى يشارعاً فى زمن عمر بن الخطاب رضى الله عنه فجاءته امرأته فوفقت على الجبل فحلفت لتقطعه او لتطلقنى ثلاثاً فذكرها الله و الاسلام فابت الا ذلك فطلقها ثلاثاً فلما ظهر اتى عمر بن الخطاب رضى الله عنه فذكر له ما كان منها اليه ومنه اليها فقال ارجع الى اهلك فليس هذا بطلاق (وكذلك) رواه عبدالرحمان بن مهدى عن عبدالمك بن قدامة الجمعى عن ابيه عن عمر رضى الله عنه بهذا القصبة الا انه قال فرفع الى عمر رضى الله عنه فابانها منه"

On one hand, there is the fear of losing his life or receiving grievous injuries and, on the other hand, there is the fear of being deprived of his wife by pronouncing divorce. In the situation, he ponders as to which of the two injuries is lesser that he may accept. And by pronouncing divorce he clearly accepts one injury and protects himself from the other, which is obviously greater for him. His adopting the course of divorce and his pronouncing the words of divorce is sufficient to hold him to be a man possessing will. His exercising that power is of the man who has the authority to exercise that power. It is apparent that when the action of a man takes place with his volition and choice whatever legal effects follow shall be applicable to him, though he may be unwilling to accept the consequences of his act.

Here one may object that in the case of compulsion there is no consent. But according to Ḥanafīs, pronouncement of divorce, whether willingly or unwillingly, in either case, has the same effect. That is to say, consent is not an element in the legal effectiveness of the words of divorce. This is at par with divorce pronounced in jest, where the pronouncer does not mean by those words to effect divorce nor does he consent to the result of his utterance of those words.

Basis for the view of the three Imams :

Traditions : The three 'Aimmah—Mālik, Shafī' and Ibn Hanbal holding divorce pronounced under compulsion not effective, rely on the following *Ahadīth* (traditions):—

1. It is narrated by Ibn 'Abbās that the Prophet (peace be on him) said "My adherents who are made to act under error, omission, or under compulsion are absolved from responsibility."¹³³

The three 'Aimmah are all at one in arguing from this *hadīth* of the ineffectiveness of divorce pronounced under compulsion.

2. Ṣafyah bint (daughter of) Shaybah has narrated from 'Āishah that she told her that the Prophet (peace be on him) said, "In the state

¹³³Hakim : *Al-Mustadrak*, Hyderabad Deccan, 1340 A.H., vol. ii, p. 198 :

”عن ابن عباس قال قال : رسول الله صلى الله عليه وسلم ان الله جاوز عن امتي الخطاء والتسيان وما استكر هوا عليه“

In another chain of authorities, the word رفع instead of تجاوز has been stated; Bayhaqī : op. cit. vol. viii, p. 356; In al-Humām : op. cit. vol. iii, 39; Ibn al-Qudamah : op. cit. vol. vii, p. 118; Ibn Nujaym : op. cit. vol. iii, p. 264.

of *ighlaq*, (impediment or compulsion) there is no divorce or manumission.”¹³⁴

Ibn al-Qudāmah Maqdisī, an exponent of Ḥanbalī *fiqh* has quoted this tradition in *Al-Mughnī* in support of Imām Aḥmad b. Ḥanbal and has given the meaning of “*ighlāq*” as “compulsion.”

Bayḥaqī in proof of the non-effectiveness of divorce pronounced under compulsion has also stated a number of the *āthā* i.e. averments of the Companions, as follows:—

1. The afore-mentioned incident of the collecting of honey as narrated by ‘Abdul Malik Ibn Qudāmah, has a version, that when the man placed the matter before ‘Umar he said, “you go to your wife, there is no divorce (in effect)”.¹³⁵

(In the earlier quoted version, it has been said to be effective as an irrevocable divorce).

2. According to Ibn ‘Abbās, as narrated by Ḥasan, divorce pronounced by a person under compulsion does not take effect.¹³⁶
3. It is narrated by Yaḥyā Ibn Kathīr that Ibn ‘Abbas considered a divorce under compulsion to be not effective.¹³⁷ Ishaq on his own authority has narrated in his book that Ibn ‘Abbās was questioned about the case of a person who was made to divorce his wife under compulsion by bandits; Ibn ‘Abbās said, “It is of no consequence.”¹³⁸
4. Bayḥaqī has narrated about Thābit A’raj that he contracted marriage with the *Um Walad* of ‘Abdul Rahman b. Zayd b. Khattāb. His son sent for him and ordered his two slaves

¹³⁴Bayḥaqī : op. cit; vol. vii, p. 356 :

”عن صفية بنت شيبة ان عائشة حدثتها ان رسول الله صلى الله عليه وسلم قال :
”لا طلاق ولا عتاق في اغلاق“

Hakim : *Al-Mustadrak* : op. cit. vol. ii, p. 198; Ibn al-Qudamah : op. cit. vol. ii, p. 118.

¹³⁵Bayḥaqī : *Al-Sunan*, op. cit. vol. vii, p. 357.

¹³⁶Ibid: ”لا طلاق المكره“

¹³⁷Ibid: ”لم يجز الطلاق المكره“

¹³⁸Bayḥaqī : *Al-Sunan*, of cit. vol. vii, p. 358 : p. 358 :

”عن عكرمة انه مثل رجل اكره اللصوص حتى طلق امراته قال قال : ”ابن عباس رضي الله عنهما ليس بشي“

to bind him and hit him with lashes. Accordingly the two slaves bound him down and started hitting him with lashes. He was asked to divorce the *Um Walad*, otherwise the lashing would continue. He then, divorced the woman. Thereafter, he stated the facts before 'Abdullah b. 'Umar and 'Abdullah b. Zubair. They attached no value to the divorce¹³⁹ (did not hold it effective).

Rationale : The three *A'imma*h (Mālik, Shafi'ī and Aḥmad b. Ḥanbal) maintain that volition and compulsion do not exist together. When there is compulsion, the will is annihilated. As validity of religious acts is based on the existence of will, unintended action of a person without will cannot be relied upon and it shall produce no legal effect.¹⁴⁰

Another argument about divorce under compulsion relied upon by the three *A'imma*h is that the Qur'an itself in the event of compulsion permits the utterance of the word of infidelity (disavowal of faith), provided one remains at heart a believer. "Any one who, after accepting Faith in Allah utters unbelief, except under compulsion, his heart remaining firm in Faith (is not liable).....but such as open their breast to unbelief. On them is wrath from Allah, and theirs will be a dreadful penalty".¹⁴¹ On similar ground the utterance of the word of divorce under compulsion cannot legally effect a divorce. Infidelity is the greatest sin in *Shari'ah*. In spite of it the utterance of the word of infidelity under compulsion (provided the one who utters remains at heart a Believer) has not been held to be an act that would attract religious sanction against it. Hence, the act lesser in degree than disavowal of faith shall not of certain produce the religious effect.¹⁴² 'Aṭā b. Abi Rubah in connection with the ineffectiveness of divorce pronounced under compulsion also argues on the basis of the Qur'anic verse quoted above.¹⁴³ In this verse the Muslims, who were being meted out cruelty at the hands of infidels and who were being compelled, under unbearable misery, to renounce Islam, were told that if they uttered the words of infidelity, at heart remaining believers and their beliefs remaining firm in faith, the same shall be excusable.¹⁴⁴ 'Aṭā, citing

¹³⁹Ibid: "فلم يردّه شيئاً"

¹⁴⁰Ibn al-Humām : op. cit. vol. iii, p. 39.

¹⁴¹Al-Qurān, Surah Al-Naḥl (The Bee) XVI : 106 :

"من كفر بالله من بعد ايمانه الا من اكره وقلبه سطمئن بالايمان ولكن من شرح بالكفر صدراً فعليهم غضب من الله ولهم عذاب عظيم"

¹⁴²Ibn al-Qudamah : op. cit. vol. vii, p. 118.

¹⁴³'Alī Al-Khafīf : *Furq al-Zuwāj*, 1958, p. 56.

¹⁴⁴There are a number of incidents of the infidel Arabs' torturing early Muslims. 'Ammār b. Yāsir is one of them. The occasion of revelation of the verse under reference is related to his incident.

This argument is met by saying that compelled person has in a way as much command over self in the pronouncement of (the words of) divorce as a jester has. Hence, like that of a jester the divorce pronounced by a person under compulsion should also be held to be effective. But the obvious answer to it is that the will of a jester is free, whereas under compulsion even if the will be considered to be existent it cannot but be restrained and distinguishable from the will of a jester. A free will and a will under compulsion cannot be placed on the same footing. Nor the same rule can be made applicable to the effects and consequences of acts performed in the two situations. The deduction of the effectiveness of divorce pronounced under compulsion from the aforesaid tradition is therefore based on wrong analogy.

2. The second tradition, "There is no abeyance (interval) in the divorce" cited on behalf of Ḥanafīs has been narrated by Ṣafwān b. 'Amru al-Ta'ī who is unreliable. Ibn Ḥazm has said about him that 'Amru pays little attention to tradition.¹⁵⁰ He also writes that this tradition is extremely weak. Hence, it cannot be accepted as reliable and the mandate for the effectiveness of divorce pronounced under compulsion cannot be based on it. Besides, there may be another explanation of the *ḥadīth*. The wife may have been sick of her husband. It may have been, in the circumstances, legally improvident to maintain their matrimonial alliance any longer. Hence the decree in respect of the divorce having taken effect may have been granted.

3. Coming to the two traditions related of 'Umar, it can never be inferred from the first one, that the divorce, inspite of its being pronounced under compulsion, shall be effective. From the generality of the word 'divorce' if it be assumed that all divorces become effective, then the divorces that are, according to all Muslim jurists, not effective, shall get no exception in view of the said tradition and that shall contravene the clear text.

4. The incident of 'honey-collector' is the second tradition that is attributed to 'Umar. This tradition clearly relates to divorce under compulsion. Bayhaqī, in a version, has reported the saying of 'Umar to the effect that he got the wife of the 'honey-collector' separated from him. The same tradition has been narrated by another chain of narrators to the effect that 'Umar said, "It is not divorce". Bayhaqī adds that 'Ali, Ibn 'Abbās, Ibn 'Umar, Ibn al-Zubayr, 'Āṭā, Abdullah b. 'Ubayd b. 'Umayr considered the pronouncement of divorce under compulsion to be invalid.

¹⁵⁰Ibn Ḥazm : Al-Muḥalla, Cairo, 1352 A.H., vol. 10, p. 203 :

"وهذا خبر في غاية السقوط فصفوان منكرو الحديث"

The Shaykh, (of Bayhaqī from whom he states the tradition) however, maintains the first pronouncement (about the effectiveness of the pronouncement of divorce under compulsion) to be more akin to truth.¹⁵¹

Traditions cited by the three Imāms : The tradition, “My adherents who are made to commit error or omission, or act under compulsion are absolved from accountability” put forth in support of the view of the three Imāms (Mālik, Shafī‘i and Ibn Ḥanbal) cannot be cited as an explicit text for the ineffectiveness of the divorce pronounced under compulsion. The words of the tradition are general and do not deal specially with divorce. Hence no clear authority respecting divorce under compulsion can be inferred therefrom. Though, certainly, as a principle it may cover a mandate respecting divorce under compulsion. But it is an established principle of jurisprudence that the mandate which is deduced by implication can have no application as a general rule. That is to say, if the words of any tradition be of general import and not specific it can *not* be assumed that it lays down moral principle as well as a rule of civil law. One mandate only has to be assumed either as a rule of civil law or a matter of spiritual principle. There is consensus of opinion of ‘*Ulamā*’ of the ‘*Ummah*’ on the point that this tradition of the Prophet means that God shall not hold the Muslims accountable for an act committed under mistake, forgetfulness or compulsion. Islam was in its infancy when the Prophet enunciated the principle. Those who accepted the faith of Islam during the early period had heathenic habits and practices. Being conditioned thus they sometimes mistakenly or unknowingly spoke out something, or under compelling need or compulsion acted in a manner that was against Islam. This made them apprehensive for their apparent transgressions. The Prophet said, “Under the circumstance God would exonerate them”.

Imam Kasani, too, expresses the opinion in his book, “*Badai‘ al-Ṣanā‘i*” that the tradition, having regard to its context, is particularly concerned with renouncing Islam under compulsion.¹⁵² Hence the principle of exoneration from legal accountability cannot be deduced from this tradition.¹⁵³ The jurists, who argue in respect of ‘divorce under compulsion’ on the basis of this tradition, overlook the said established principle of jurisprudence.

¹⁵¹ Bayhaqī (d. 854 A.H.) ; *Al-Sunan al-Kubrā*, Hyderabad Deccan, 1353 A.H., vol. vii, p. 357.

¹⁵² *Al-Kāsānī* (d. 587 A.H.) : op. cit. vol. vii, p. 182.

¹⁵³ Ibn al-Humām (d. 861 A.H.) : op. cit. vol. iii, p. 39; Ibn Nujaym (d. 970 A.H.) ; op. cit. vol. iii, p. 264.

2. Next, the tradition, "No divorce under impediment or compulsion" narrated by 'Aishah, relied upon by the three Imāms and particularly Aḥmad b. Ḥanbal has also been reported by Abū Da'ūd¹⁵⁴ and Bayhaqī too through different chains of narrators.¹⁵⁵ For two reasons this tradition on 'divorce under compulsion' cannot become the final verdict :—

- (i) The first reason is that Zahbī in his book, "*Talkhiṣ al-Mustādrak*" has said that Muḥammad b. 'Ubaid b. Abī Ṣālih Makkī in one chain of narrators of Abū Da'ūd, Ibn-Majah and Bayhaqī, is not reliable. Abū Ḥatam calls him weak.¹⁵⁶ In the other chain of narrators Na'īm b. Ḥammād is said to be used to reporting unauthentic traditions.¹⁵⁷ Some of the narrators among the other authorities of Bayhaqī are also said to be weak or unknown.
- (ii) The second reason, for not accepting this tradition for the non-effectiveness of divorce under compulsion, is that there is difference of view on the meaning of the word, *ighlāq*. Abu 'Ubayd and Qutaybi have explained the word *ighlāq* occurring in the tradition as compulsion. Abū Bakr says that he asked the meaning of the word *ighlāq* from Ibn Durayd al-Naḥvī and Abū Ṭahir al-Naḥvī: both of them replied that the Prophet from that word meant compulsion.¹⁵⁸ Abū Da'ūd, however, has taken the word, *ighlāq* to mean the state of fury and wrath.¹⁵⁹ Aḥmad b. Hanbal has been stated to have construed the same meaning, as that by Abū Da'ūd.

Meaning of Ighlāq : The literal meaning of the word, *ighlāq* is to shut, to forbid or to stop. It appears that "compulsion" is the figurative meaning of the word *ighlāq* because restraint is placed on behalf of the person who compels on the authority of the person who is compelled and operation of his authority and will is barred. Abū Da'ūd has taken it to mean as 'fury and wrath'. The chapter heading under which he has placed the said tradition has the title of "Divorce under Wrath". Abū Da'ūd probably has taken the meaning of *ighlāq* as fury and wrath because in the state of fury and wrath also a man's clarity of thinking disappears. Some of the 'Ulama have

¹⁵⁴Abū Da'ūd : *Al-Sunan*, Kārkhāna Tijarat Kutub, Karachi, p. 298.

¹⁵⁵Al-Bayhaqī : *Al-Sunan al-Kubrā*, vol. iii, p. 357.

¹⁵⁶Al-Hakim : *Al-Mustadrak*, Hyderabad Deccan, 1340 A.H. vol. ii, p. 198.

¹⁵⁷*Tahzib al-Tahzīb*, Hyderabad Deccan, 1326 A.H. p. 461-62.

¹⁵⁸Ibn Qudāmah *Al-Maqdisī* : op. cit. vol. vii, p. 118.

¹⁵⁹Abū Da'ūd : *Al-Sunan*, Karachi, op. cit. 298.

taken *ighlāq* to mean” “three divorces” pronounced by one word because the pronouncement of three divorces by one word too closes the door of having recourse to the woman (except when another man marries that woman, has sexual intercourse with her and either divorces her or dies making the woman eligible to be re-married with her former husband, if they so desire).

Interpretation of Traditions : In short, the word *ighlāq* is *muḥṭamal* i. e. capable of bearing several meanings. It is a settled rule of the interpretation of Traditions that when a tradition is open to more than one interpretation, assigning one particular meaning to it without support from some other tradition is not proper. Al-Shāfi‘ī in his foremost work on jurisprudence, *Al-Risāla fi ‘Uṣūl al-Fiqh wal Ḥadīth* has said :—

“When a tradition bears several meanings, then except for its general meaning, no particular meaning should be assigned unless such meaning gets support either from any other tradition of the Prophet or from the consensus of opinion of the Muslim ‘Ulamā’”.

Hence the tradition, “No divorce under impediment or compulsion¹⁶⁰” can not be accepted as a proof of the non-effectiveness of divorce pronounced under compulsion, unless the meaning of the word, *ighlāq* as compulsion is supported by some other tradition of the Holy Prophet, or by the consensus of his companions or of the Muslim ‘Ulamā’.

It is not disputed that the meaning of the word *ighlāq* as compulsion, if so in the said tradition, is not supported by any other tradition of the Prophet. If, however, the meaning of the word *ighlāq* is accepted to be compulsion (only), another difficulty would arise. As is the non-effectiveness of divorce pronounced under compulsion stated to be a tradition of the caliph ‘Umar so also is the effectiveness of divorce pronounced under compulsion stated to be another of his traditions. It would therefore, be concluded that the traditions of ‘Umar being different in their versions do not lend us any support for the effectiveness or ineffectiveness of divorce pronounced under compulsion so as finally to determine the meaning of the word *ighlāq* as compulsion. Likewise, so far as the ‘*ijmā*,’ consensus, of the opinion of Muslim ‘Ulamā’ is concerned, the difference between the Ḥanafī and the other schools of *fiqh* is enough to hold good, in this case, the assertion of Imām Shafi‘ī to the effect that by applying the principle of

¹⁶⁰Al-Shafi‘ī, Muḥammad b. Idrīs : *Al-Risālah fi ‘Uṣūl al-Fiqh wal Ḥadīth* : Cairo, p. 322 :

فَلَمَّا احْتَمَلَ الْمُعْزِينَ وَجِبَ عَلَى أَهْلِ عِلْمٍ أَنْ لَا يَحْمِلُوهَا عَلَى خَاصٍ دُونَ عَامِ الْأَبْدَالَةِ : مِنْ سُنَّةِ رَسُولِ اللَّهِ أَوْ أَجْمَاعِ عُلَمَاءِ الْمُسْلِمِينَ“

‘*ijmā*’ it cannot be held that divorce pronounced under compulsion does take effect.

Reasons for difference of views :

The reason for the difference of opinion among the jurists is that those jurists who hold a divorce pronounced under compulsion as effective, consider the person compelled as possessed of a free will, because the person inspite of his being under-compulsion, is free in the choice of utterance or non-utterance of the words of divorce and he chooses one thing while rejecting the other. According to them, that person only shall be called a person under compulsion who is totally deprived of acting according to his will. On the other hand, the jurists according to whom a divorce pronounced under compulsion is non-effective, call the one who pronounces that divorce to be powerless in Shari‘ah, and his pronouncement of the words of divorce shall be taken to have been pronounced under compulsion and force and not deliberately and willingly.¹⁶¹

Criticism :

So far as the reasoning of the jurists is concerned it is based on the existence of will, its form and use. As defined in the books of *fiqh*, volition is the free exercise of one’s will in any act or omission. Thus, will imparts credibility to one’s act or omission (as proceeding intentionally from that person).

It has to be seen whether the person who is being compelled to pronounce divorce possesses volition and whether he is quite capable of putting his intention into effect according to his will and wish. It cannot be denied that the person compelled is, at the time, under pressure. A restriction is placed over his will and authority, and he does not remain the master of his will or intention which he was possessed of prior to the restriction and curb being placed over it. On account of the pressure and restriction his will or authority, instead of being perfect and free, becomes vitiated. The person is deprived of his right and of his capability of putting his real intention into force according to his own will and wish. When the legal exercise of power is based on having authority and the authority is negated or is made non-existent or is, at least, vitiated, the exercise of such power should, therefore, be held to be unreliable in the eye of law.

¹⁶¹Ibn Rushd (d. 595 A.H.) : *Bidayat al-Mujtahid*, Cairo, 1379 A.H. vol. ii, pp. 81, 82.

Modern Legislation :

By enactments the pronouncement of divorce under compulsion in Iraq,¹⁶² Egypt,¹⁶³ Morocco,¹⁶⁴ Jordan,¹⁶⁵ and Sudan has been made non-effective and the rule is being acted upon.

Indo-Pakistan Law :

Indo-Pakistan Courts in cases of the Ḥanafīs have given decisions that divorce pronounced under compulsion is effective.¹⁶⁶ Accordingly in the case of *Ibrahim Moolah v. Enayat-ur Rahman* it was held that divorce pronounced under compulsion is effective. The learned judge relied in his decision on Hidayah. The Privy Council in *Rashid Ahmad v. Anisa Khatoon* (I.L.R. 54 All. 46 P.C.) has expressed the same view. It is also held in the case referred to above that divorce pronounced in jest is valid and effective. The Calcutta High Court too in the case of *Jarina Akhtar v. Hafizuddin Khan* referring to Baillie's *Digest of Mohammadan Law* held the divorce pronounced under compulsion as effective.¹⁶⁷ Justice Sir Shah Sulaiman of Allahabad High Court, in the case of *Noor Bibi and others v. Ali Ahmed and others*¹⁶⁸ referring to the Ḥanafī *fiqh*, raised a question whether it would be against public policy to hold a divorce pronounced under compulsion as effective? The learned judge, however, expressed no definite opinion of his own. In my view, holding divorce pronounced under compulsion to be effective and valid is against public policy as well. It may, however, be pointed out that public policy is a recognised legal term with determinable connotation which deals with general welfare and not mere expediency which should be related to some other concept e.g. expediency recognised by the *Shari'ah*.

¹⁶²(1869) 12, Sutherland Weekly Reports, 460.

¹⁶³AIR 1926 Cal. 242; 30 CWN 178.

¹⁶⁴AIR 1925 All, 450; 88 I.C. 408.

¹⁶⁵*Qanūn al-Aḥwāl al-Shakhsiyyah*, Iraq, No. 188 of 1959 A.C. Sec. 35 :

”لا يقع طلاق .. المكره“

¹⁶⁶*Qanūn al-Miṣrī*, No. 25, 1929, Sec. 15 :

”لا يقع طلاق السكران والمكره“

¹⁶⁷*Mudawwanah al-Aḥwāl al-Shakhsiyyah*, Morocco, Chapter xxxix :

”لا يقع طلاق السكران الطافح والمكره“

¹⁶⁸*Qanūn Huqūq al-Āilāh*, Jordan, p. 38 :

”والطلاق الواقع بالاكراه غير معتبر“

Conclusion :

After examining the entire question, the present author comes to the conclusion that majority, prudence and having authority or free exercise of will are essential for the pronouncement of an effective divorce. The authority in divorce under compulsion, is not only vitiated, rather it becomes non-existent. Divorce under compulsion, thus, cannot be held to be effective in all cases. The divorce under compulsion ought to be held ineffective when it is pronounced under the real risk of grievous hurt to the compelled person himself or to any of his family-members, provided that the intention of the compelled person is not to effect divorce. The question of the degree of hurt and the risk involved ought to be decided by a Court in the light of each case where the effectiveness of divorce is challenged on the ground of compulsion.

Section 114. An admission under compulsion, whether oral or written, by a husband of having divorced his wife is ineffective.

Admission under
compulsion of
divorce

COMMENTARY

All the jurists are unanimous on the point that an admission that the man has divorced his wife obtained under compulsion, is ineffective because the person has not, in fact, divorced his wife. He has rather made a wrong admission under compulsion. As the divorce in fact never took place, marriage relationship is not broken off. It is said in Baḥr al-Rā'iq that in such circumstances the non-effectiveness of divorce shall be a matter between the man and Allah but judicially such admission shall be held to be conclusive.¹⁶⁹

Indo-Pakistan Law :

Calcutta High Court in the case of *Jarina Akhtar Khatoon v. Hafizuddin Khan* held that the admission of divorce obtained under compulsion is not a divorce in its effect and the conjugal tie, on that account, cannot snap.¹⁷⁰ Justice Sir Shah Sulaiman as well held in the case of *Noor Bibi v. Ali Ahmed*, that the admission of divorce obtained under compulsion is different from the actual pronouncement of divorce under compulsion. The learned Judge therefore held the admission obtained under compulsion as ineffective.¹⁷¹

¹⁶⁹Ibn Nujaym : (d. 970 A.H.) op. cit. vol. iii, p. 264.

¹⁷⁰A.I.R. 1926, Cal. 242.

¹⁷¹AIR 1925 All. 450; 88 I.C. 408.

Section 115. Written divorce under compulsion is void.

Written divorce
under compulsion

COMMENTARY

All the *A'imma* including Abu Yusuf and Muhammad are unanimous on the point that divorce got written under compulsion shall not be effective.¹⁷² They argue that the written divorce contrary to verbal divorce is valid only under necessity. If there is no necessity, the written divorce is not valid. In other words, if the writing be under necessity, for instance the written divorce of a dumb person according to Abu Hanifah and his two disciples, it shall be effective. When the divorce written without necessity is, according to jurists, ineffective, the divorce written under compulsion shall, all the more, be ineffective.

Section 116. A divorce pronounced by the husband under fraud will be declared by Court, in appropriate cases, to be ineffective.

Divorce under
fraud

COMMENTARY

A divorce pronounced by the husband as a result of fraud is deemed by the *sunnis* to be binding on him. There, may, however, arise cases in which the fraud is of such a nature that the man under the instigation of someone interested pronounced the divorce without understanding the significance of the words or knowing that he was thereby divorcing his wife. Ibn 'Ābidīn cites such an example in *Radd al-Muḥtar*, "If some one teaches an illiterate person to pronounce "Talaq" and he speaks it while addressing his wife, a divorce would be effected in law according to some jurists but others hold otherwise."¹⁷³ The latter have stated that no divorce would be effected so as to save people from injury under fraud.

To the present writer, the fact that a fraud had been committed on the husband, coupled with the husband's statement on oath that he had no intention of divorcing his wife and would not have pronounced divorce had the fraud not been committed on him, ought to be sufficient for the Court to hold the divorce to be ineffective. A wrong doer should not be allowed to take advantage of his own fraud. It is an established principle of law that fraud vitiates the entire transaction, e.g. if a person declares on oath that he had divorced his wife under fraud played upon him, the pronouncement of divorce should be held ineffective, as the husband was thereby deceived, depending on the facts of each case.

¹⁷²Ibn 'Ābidīn : (d. 1252 A.H.) : op. cit. vol. ii, p. 432; Ibn Nujaym (d. 970 A.H.) : op. cit. vol. iii, p. 264.

¹⁷³Ibn 'Ābidīn : op. cit. vol. ii, p. 436.

Section 117. A divorce pronounced by the husband in ignorance of the meaning of the words he utters is ineffective.
 Divorce in ignorance of meaning

COMMENTARY

There is a difference of opinion among the jurists of different schools of Muslim law about the effectiveness of the words of divorce pronounced in ignorance of their meaning.

According to Hanafis, a divorce is effective even if it has been pronounced in ignorance of the meaning of the word, *Talaq*.¹⁷⁴ On the contrary, Shafi'is do not recognize the validity of a divorce pronounced in ignorance of the meaning of the words uttered by the husband.¹⁷⁵ According to Ahmad b. Hanbal, if a husband pronounces a divorce without understanding the meaning of the words the divorce shall not be effected.¹⁷⁶

The present writer finds himself in agreement with the view as expressed by the two *a'imma*h. The law has also been codified accordingly.

¹⁷⁴.Ibid.

¹⁷⁵.Al-Ghazāti, Abu Hamid : *Al-Wafīz*, Cairo, 1317 A.H., vol. ii, p. 56.

¹⁷⁶.Sharaf al-Din Al-Magdisī: and *Al-Iqnā'*, Cairo, vol. iv. pp. 10-11.

CHAPTER—XIV

Revocability & Irrevocability of Divorce

Section 118. In case of pronouncing one or two revocable *Raj'at** (having recourse to the wife). divorces to the wife the husband has the right of having recourse, by words or acts, to his wife without her consent, or re-contracting marriage with her without the fixation of a fresh dower, provided her term of probation has not expired at the time of having recourse to her, i. e. at the time of revocation of divorce.

COMMENTARY

A husband who has pronounced a revocable divorce to his wife has the right to revoke the divorce and take her back without the necessity of remarrying her. This right can be exercised only during the period of *'iddat*, because the marital relationship terminates on the expiry of the prescribed period of *'iddat*. Thus, such right cannot be exercised if the *'iddat* expires or when no *'iddat* is prescribed such as divorce in unconsummated marriage. Further, there can be no retraction in the case of an irrevocable divorce because the relationship of husband and wife is completely severed on the very pronouncement of it, regardless of *'iddat*.

In fiqh the term “*Raj'at*” is used for the revocation of divorce. *Raj'at* is defined in *fatāwā 'Ālamgīryyah* as maintaining a marriage in its former position while the wife is still in her *'iddat*.¹

Generally speaking, maintaining the marriage contract at its original position, after pronouncing revocable divorce to the wife, is called “*Raj'at*,” which means resumption of marital relationship or having recourse to one's own wife. In legal parlance *Raj'at* means resumption of conjugal relation with one's own wife without her consent, re-marriage or fresh dower,

*The discussion on “*Raj'at*” under this section is mainly based on Sarakhsī's *Al-Mabsūt*, Cairo, 1324 A.H., vol. vi, pp. 19-30, unless otherwise indicated in the footnote.

¹*Shaykh Nizām : Fatāwā 'Ālamgīryyah*, Kanpur, 1349 A. H., vol. ii, p. 109.

asserting a subsisting marriage-tie or coverture, notwithstanding the pronouncement of a revocable divorce².

Qur'ānic sanction : It is laid down in the Qur'an : "When ye divorce women and they fulfil the term of their 'iddat, either take them back on equitable terms or set them free on equitable terms.³ For 'iddat on divorce, it is commanded in the holy Book, "Divorced women shall wait concerning themselves for three monthly periods . . . And their husbands have the better right to take them back in that period if they wish for reconciliation."⁴

The Qur'ānic verse uses the word "imsāk", which literally means "keeping back". This corresponds to seeking or maintaining perpetuity of the marriage proprietorship (in respect of the wife), not to its restoration after it has been lost. The *Raj'at* is without consideration because the husband resumes conjugal relationship on existing entitlement as it had not perished at the time of resumption. The word "*Ba'ūl*" occurring in the second verse is the plural of "*Ba'l*," which means 'husband.' It is a pointer to the fact that *raj'at* can only take place during the 'iddat, the subsistence of marriage. On the expiry of 'iddat the person does not remain *ba'l* as the marital relationship ceases.

Sunnah of the Prophet : When the husband pronounces a revocable divorce to his wife, during her state of purity or in her menses or

²Al-Haskafi : *Al-Durr al-Mukhtār*, Cairo, vol. ii, *Kitab al-Talaq*, Chap. "*Raj'at*"; Ibn Nujaym : *Bahr al-Rā'iq*, Cairo, vol. v, p. 54 :

"الرجعة ابقاء النكاح على ما كان دامت في العدة"

Sharḥ Al-Dasūti on *Khalil's Al-Mukhtasar* (on *Mālikī fiqh*), Cairo, vol. ii, p. 485 :

"الرجعة عود الزوجة المطلقة للعصمة من تجديد عقد"

Ibn Ramli : *Nihāyat al-Muhtāj*, (Shafi'ī *fiqh*) Cairo, 1938, vol. vi, p. 147 :

"الرجعة رد المرأة الى النكاح من طلاق غير بائن في العدة"

Muhammad b. Maflah : *Al-furū'*, (Hanbali *fiqh*) Cairo, vol. iii, p. 228 :

"الرجعة من طلق بلا عوض من دخل بها ودون ما يملكه من العدد فله رجعتها

ما دامت في عدتها"

Qāḍi Ahmad b. Qāsim al-Ghassī : *Al-Taj al-Madḥhab*, (Zaydiyyah *fiqh*) Cairo, 1938, vol. ii, p. 216.

³Al-Qur'ān, surah *Al-Baqarah*, (The Cow), 11 : 231,

"وإذا طلقتم النساء فبلغن أجلهن فامسكوهن بمعروف او سرحوهن بمعروف"

⁴Ibid : II, 228,

"والمطلقت يترصن بانفسهن ثلاثة قروء ويعولتهن احق بردهن في

ذلك ان ارادوا اصلاحاً"

after they had sexual intercourse, he may have recourse to his wife during her term of probation. This is supported by the event that the Holy Prophet (peace be on him) divorced (by a single divorce) his wife, Sawdah, by saying 'I'taddi i. e. count thy term of probation. Thereafter, he had recourse in her term of probation. Likewise, the Prophet pronounced revocable divorce to his wife, Ḥaṣṣah. He had recourse to her, by sexual intercourse with her, as (in law) the marriage contract exists so long as the term of probation continues.

Right of Revocation : The right of revocation of divorce continues so long as the wife is undergoing her period of probation, 'iddat,⁵ prescribed by the *Sharī'ah*. If the term of probation expires, the husband has no right of having recourse to his wife. The marriage contract between the husband and the wife stands terminated. Consequently, as the marriage-tie, on the expiry of the term of probation, snaps, it cannot be revived. Indeed, the parties may enter into a fresh marriage contract if the previous marriage contract stood terminated by one or two revocable divorces and the period of 'iddat has expired.

Method of Raj'at : If the husband wants to have recourse to his wife during her term of probation the best method is that he should first pronounce the word of *rujū'* (revocation) in presence of two witnesses, and then he may resume his conjugal relationship with her. In the opinion of Ibn Mas'ūd also the virtuous method of having recourse to is that the husband at the time of oral revocation of divorce must have two witnesses. When he was asked for his verdict on the action of a person who had sexual intercourse with his divorced wife without oral declaration, he said that the person contravened the *sunnah* both in pronouncing the divorce and in having recourse to his wife. The proper way was that he at first instance ought to have made oral declaration of recourse to the wife in presence of two witnesses and then should have sexual intercourse with her.

In fact, it is the most virtuous method of having recourse to the wife that the husband makes an oral declaration about it, in presence of two witnesses, but the recourse by act is equally valid and effective. If the husband, therefore, during the term of probation of his wife lustfully kisses her, touches her, or looks at her private parts these acts of having recourse to her shall establish *Raj'at* undoubtedly.

As the husband keeps the marriage contract intact by having sexual intercourse with the wife, similarly from the aforesaid acts he re-affirms that

⁵For full discussion on 'iddat, see Chapter on 'Iddat, *infra*.

he intends to keep the marriage contract intact (vide Section 18 pp. 86-87 "prohibition by affinity" where such acts establish affinity). If the husband looks at other than the private parts of the body of his divorced wife, the same shall not be considered amounting to *Raj'at*, for looking at other parts of the body is not exclusively confined to one's wife. The open parts of the body of other women also can be looked at. The same rule is applicable to the principle of creating prohibition by affinity. The principle is that only such acts, exciting corresponding feelings, are accepted as acts of *Raj'at* as are exclusively permitted between the husband and wife, the act and passion both being essential.

Raj'at from the side of the wife : On the same principle Abu Hanifah and his disciple Muḥammad hold that if within the '*iddat*' the divorced wife resorts to such acts with corresponding passions as are exclusive between the husband and wife *Raj'at* will be effected. Abū Yūsuf, however, differs on the ground that it is the husband who has the proprietorship of the marriage contract. The other two Imams base their view of the matter on the fact that lust and passion are common to both man and woman. They support their opinion by citing the analogy of 'prohibition by affinity' when both man and woman acting in such lustful manner create the prohibition with equal certainty. In case of acts of intimacy proceeding from the side of the divorced wife, it would be incumbent that the husband accepted that she so acted lustfully. If he does not so admit *Raj'at* will not be established. The admission as above on the husband's part is so obligatory that it cannot be replaced even by the testimony of two witnesses that the woman acted lustfully.

Consideration for Revocation : There is no consideration for revocation of divorce, i. e. having recourse to the wife, during her period of probation, as the marriage-tie subsists. For the same reason the consent of the wife, too, is not required for having recourse to her.

The right of 'having recourse to' belongs only to the husband, as God says, "Their husbands are more entitled to have recourse to them" (II:228).

Revocable divorce and sexual intercourse : Al-Sarakḥṣī writes that the word, "*ba'ūl*" in the above-quoted verse means the "husbands". The use of the word "*ba'ūl*", for husbands, proves that marriage, after the pronouncement of revocable divorce, still continues. There is, in this verse, a hint also to the effect that the husband after having pronounced a revocable or two revocable divorces may validly have sexual intercourse with the wife during her period of '*iddat*'. The rule followed by the Hanafi 'Ulamā' is the same viz. as laid down by Sarakḥṣī that the husband after having pronounced a revocable divorce may lawfully have sexual intercourse with

her wife during her term of probation. But the desirable method is that the husband should at first have recourse to the wife by oral declaration in the presence of two witnesses and then he may have sexual intercourse with her.

The view of Al-shāfi'ī : According to Al-Shāfi'ī the husband's having sexual intercourse with his divorced wife shall be lawful only when he, during his wife's term of probation, has first recourse to her by oral declaration in the presence of two witnesses. Al-Shāfi'ī, in support of his point of view, cites the verse, "If they (spouses) intend rectification⁶. And rectification is possible when there is some defect. He says that the defect arises because of the sexual intercourse being unlawful.

Criticism on Al-Shafi'i's view :

The contention of Al-Shāfi'ī in this respect is that without having recourse to the divorced wife by oral declaration, to have sexual intercourse with her is not lawful, because the divorce has its own effect. The Ḥanafīs, however, on this point argue that God has called "Raj'at" (having recourse to one's wife) as "Imsak" retaining or keeping back. It indicates that marriage contract still subsists unconditionally. When the marriage contract subsists, having sexual intercourse is lawful in as much as the very meaning of the continuance of marriage contract is that the husband's having sexual intercourse with his wife be lawful. The subsistence of the marriage contract is further supported by the fact that after a revocable divorce the husband can exercise several kinds of rights over such divorced wife during her term of probation, e. g. *Zihār*, *īlā*, and *li'ān*⁷, the last entitling the wife to sue for dissolution of marriage. Besides, if during the wife's 'iddat one of the couple dies the survivor shall inherit from the other. The husband can also agree to *khul'a*^{7a} with the wife. The right of agreeing to *khul'a* and the right to exercise other forms of the termination of marriage, can only vest in the husband if and only when the marriage contract subsists. This subsistence of the marriage contract is further established in as much as (even without oral declaration of *Raj'at*) it is quite lawful for the husband to have sexual intercourse with her. By

⁶Al-Qur'an : Surah, *Al-Baqarah* (The Cow), 11 : 228; Al-Nisā' (The Woman), IV : 35,

”وبعولتهن احق بردهن في ذلك ان ارادوا اصلاحا“-

”ان يريدوا اصلاحا“-

⁷For full discussion on these forms see Chapter on "*Zihār*, *Ilā* and *Li'ān*," *infra*.

^{7a}For full discussion see Chapter on "*khul'a* and *Mubarāt*", *infra*.

itself recourse is not the reason for the lawfulness of the sexual act. It is apparent that in recourse it is not necessary either to fix fresh dower or obtain the wife's consent. This confirms the subsistence of the marriage-tie.

A further argument supporting the existence or continuance of *Nikāh* after a revocable divorce, is the pronouncement of a second divorce which can also be lawfully made. As the marriage contract continues to remain intact after the second divorce, it is bound to be held intact after the first divorce. Indeed, in case of pronouncement of one or two revocable divorces the termination of the marriage contract depends on the fact that recourse to the wife is abstained from till the expiry of her term of probation. The rule is that the thing which depends on the existence of some condition is itself non-existent before the coming into existence of that condition. Almighty Allāh has expounded the act of 'having recourse to' with the words of *Radd* and *Islāh* because the original state revives after the recourse is had to the wife. It is rather resumption of marital intimacy, under a subsisting marriage contract, (such intimacy being in suspension by revocable divorce or divorces). Thus, intercourse with the wife, when the right under marriage contract subsists and the effect of divorce is in the state of suspension, is not, therefore, unlawful. Such intercourse is equally lawful both before and after oral declaration of having recourse. It is rather a means of restoring or maintaining marriage contract at its original state.

Conclusion :

According to Ḥanafīs, therefore, husband's intercourse with the wife during her term of probation is in effect revocation of divorce and *Raj'at* par excellence. Al-Shāfi'ī, however, holds the view that recourse to the wife through sexual intercourse is not lawful as sexual act according to him is at par with a marriage contract. Therefore, if a marriage cannot be contracted without the utterance of the particular words, likewise recourse to the wife, too, can only be had by oral declaration. Hence, having sexual intercourse prior to the oral revocation of divorce, according to him, is not lawful. According to the Ḥanafīs, however, since the marriage contract subsists even prior to *Raj'at*, the marriage contract can be re-affirmed all the more properly by an act of sexual intercourse which is one of the main purposes of marriage. This is on all fours with *Raj'at* in case of *Ilā'*, wherein, should the husband have sexual intercourse within the period of probation, *Ilā'* does not take effect. It is well recognised that in the case of *Ilā'* recourse is had through sexual intercourse. Similarly recourse should be lawful after revocable divorce or divorces, without the necessity of first having recourse by oral declaration.

Conditional Revocation : Revocation of divorce cannot be made contingent on some condition nor expression of intention to do so would be of any effect. If the man says that he would have recourse to the wife next day or by a certain time it will have no legal effect.

Admission of Revocation : If the husband tells his wife within the period of her 'iddat that he had revoked the divorce, the words of the husband, in the circumstances, shall be believed, because he informs of such an act of his i.e. revocation, at the time when the right of revocation subsists. If the husband tells her after the expiry of the period of probation it shall not be believed, because he speaks of it at the time when he has no subsisting right of revocation. The reason is that such admission can be either true or false. If it is within the period of probation when he has the right of revocation he cannot be presumed to speak falsehood. His statement, therefore, shall be believed. If he makes the admission after the lapse of the period of probation when he has no right of revocation he may not be speaking the truth. His statement, therefore, shall not be believed. This is on the analogy of the admission made by an agent which binds the principal only when made during a subsisting agency. If, however, the husband after the lapse of the period of probation of his wife says that he had recourse to the wife who supports his statement it shall be believed, because one of the two must be speaking the truth. So when both of them admit the fact of having recourse to, it shall be established, particularly because both agree.

Al-Sarakhsi says in Al-Mabsut that after the lapse of the period of probation of the divorced wife if the husband produces two witnesses to prove the fact that he had revoked the divorce within the period of her probation, then, too, the fact of revocation shall be established because a fact testified to by two witnesses establishes the fact in the same manner as if it has been seen by one's own eyes. This is a peculiar situation. Here a fact which is not accepted on the husband's admission is declared to be proved through witnesses. If the husband's admission of *raj'at* is made after the expiry of 'iddat, can he or can he not compel the wife to take an oath that *raj'at* took place. According to Abū Ḥanīfah he cannot but according to his two disciples he can compel the wife, for the oath is in respect of *raj'at*.

Revocation and menses : The period of probation of a woman having her menses is three such monthly courses. The man may revoke the divorce in such a case upto the end of her third menstruation. When the divorced wife is free of her third menstruation but has not yet bathed, the husband in that condition may revoke the divorce, provided that her third menstruation be of less than ten days. If the third menstruation be of ten days, the husband in that condition of his wife cannot revoke the divorce as

the longest period of menses is ten days. In menstruation of less than ten days it cannot be said of certain that it has ended. There is a possibility of its re-starting. Hence, the remaining period of the ten days shall be counted as the period of probation and revocation of divorce therein shall be valid. The Companions of the Holy Prophet say that the husband has the right of revocation of divorce till she has not bathed or is not able to say her prayers and it is obvious that she can say her prayers only when she has bathed. If the wife, however, delays in her bathing to such an extent that the nearest prayer time passes away, according to Hanafis, the husband, then, has no right of revocation. According to Zufar, another illustrious pupil of Abu Hanifah, however, the husband, in such an event, too, has the right of revocation. He acts on Prophet's Companions' saying, *ما لم تحل لها الصلوة* i.e. the husband can have recourse to his wife till the offering of prayer does not become lawful for her. According to Zufar, the husband's right of revocation, in such event, remains intact because prior to her bathing there still can be assumed the possibility of her menstruation re-starting. But the Ḥanafīs, in general, argue that if the time of offering prayers due passes away her probation ends. If the matter is examined deeply it would appear that the question of menses not re-starting after bathing is as speculative as its continuance before bathing. Consequently bathing itself is of no account and the end of probation will depend upon the passing of the time of prayer due at the end of the (longest possible) period of menses of the lady. To the present writer, the opinion of the Prophet's Companions points to the time when the offering of prayers becomes incumbent upon the woman. Let it be supposed that the wife in the hope of her husband's having recourse to her does not bathe for a month. Shall the husband then have the right of having recourse to her till that time? Certainly the answer would be 'No'.

Revocation of divorce without knowledge of wife : If divorce as well as revocation be without informing the wife of the same, the marriage remains intact, though the husband, transgressing the practice of 'Ibn Umar in not having two witnesses for revocation, will contravene Prophet's *sunnah*.

Revocable divorce and Inheritance : If a person revocably divorces his wife and during her term of probation one of the spouses dies, the one surviving shall inherit the other, as the marriage relationship exists till the termination of the period of probation. In the circumstance, there is no difference between the pronouncement of one or two divorces, but they must be necessarily revocable.

Having recourse to a Kitābiyah wife : Just as the husband can have recourse to his Muslim wife during her term of probation, likewise he can

have recourse to his *Kitābiyah* wife (one believing in a revealed Book) because having recourse to means keeping alive the proprietorship created under the marriage contract as stated above.

Retraction of irrevocable divorce : If a person pronounces an irrevocable divorce to his wife or gives *Khul'a* to his wife as desired by her, or effects divorce by *Ilā'* or a wife, authorised to divorce herself irrevocably, pronounces an irrevocable divorce to herself as her husband's delegatee and observes her term of probation, in such cases the husband cannot have recourse to his wife, as the same would contravene the manifest directive of the Holy Qur'ān and would as well be against the principles of *Qiyās*. Revocation on the basis of Qur'anic injunction is proved in the case of a revocable divorce, not in the case of divorce irrevocable. The argument is that if the husband pronounces a revocable divorce to his wife, the marriage proprietorship continues and the husband can have recourse to his wife within her term of probation; whereas when the husband pronounces irrevocable divorce, the marriage proprietorship ends and the relationship of husband and wife under the marriage contract terminates and the husband cannot have recourse to the wife. Similarly, in case of *Khul'a*, too, as the wife obtains divorce on payment of consideration and proprietorship under marriage contract terminates forthwith, the husband cannot have recourse to the wife.

Revocation of "divorce by option" : Regarding the nature of separation by the exercise of the option of divorce by the wife, under the delegated authority, it is quite plain that the wife shall like to effect separation irrevocably. It is also reasonable that the exercise of the power is to be linked with the condition of revocability or irrevocability at the time of its delegation. Yet, in the absence of any such specific mention, the wife shall be entitled to effect separation either revocably or irrevocably. The modern trends in Islamic law are in favour of the revocability of divorce. The present writer is also inclined to hold the view that the divorce pronounced by the wife, under her delegated authority, is deemed to be in the nature of a revocable divorce but its revocation shall be with her consent and her will. The pronouncement of divorce by the wife under option of divorce, as agreed by the husband, is in the exercise of her own right and she alone has the right to revoke the divorce pronounced by her, if she has not exercised the option irrevocably.

Suggestion :

Under the Muslim law, revocation of divorce has been held to be the right of husband. Since under the traditional Muslim Law the divorce pronounced by a wife, under her option granted to her by the husband, has

been considered to be an irrevocable divorce, it did not invite jurists' attention to the wife's right of revocation in case of such divorces. The Pakistan Muslim Family Laws Ordinance, 1961 talks of conciliation only. It may, therefore, be suggested that the right of revocation of divorce, if pronounced by the wife, under the option of *talāq tafwīd* shall rest with the wife alone. The reason is that if she later on repents her decision, the door may remain open to her for going back to her husband, after revoking the said divorce during her period of her *'iddat*. But in case the husband gives the *option* to pronounce an irrevocable divorce, and the wife exercises the right irrevocably, the situation will then change and there will be no right of revocation. The parties may, however, remarry *afresh*. The Ordinance may, therefore, be amended suitably.

Revocation and unconsummated marriage : If a person after valid retirement pronounces divorce to his wife but says that he had no sexual intercourse with the wife, he, in the circumstances, cannot revoke because the facts as admitted make out an irrevocable divorce and his revocation shall not be held valid. Valid retirement affects the question of payment of dower only so that the divorced wife be not put to loss and there is no loss to the wife in case of revocation. In other words, if the divorce has been pronounced before consummation of marriage the divorce cannot be revoked.

Probation and absence of menses : The basic principle of calculation of the period of probation with reference to menses is that in such cases periods of purity and menses cannot be combined. The period of revocation when menses have not started in the case of a minor girl or have ceased altogether in case of a major, shall be counted at three months. But if any of these, after being divorced, sees menses start, the prior clean period of purity shall be discounted and her probation shall consist of three menstruations. Restart of menses for an over age woman or start of menses in a minor girl make her subject to the rule governing a woman having regular menses i.e. a probation extending over three menses discounting the suspension of discharge period. On the same principle, if the discharge ceases altogether after one menses the period of probation shall be three months from such cessation discounting the one discharge. Calculation of *'iddat* on this principle provides the limitation for revocation.

Revocation and Witnesses : According to Abū Ḥanifah, his two illustrious disciples Abū Yūsuf and Muḥammad and the Ḥanafī jurists in general, having two witnesses at the time of oral revocation of divorce is desirable. Preferential opinion of Malik, too, is in accordance with that of the Hanafis. Al-Shafi'ī seems to have expressed two views at different times about the matter in question. The first that the presence of witnesses

at the time of divorce and oral declaration of revocation is desirable. The second is that it is incumbent. But his first opinion has been accepted as his final verdict. The view of Aḥmad b. Hanbal is also in support of that of the Hanafis.^{7b} ‘Abdul Wahāb Al-Shi‘rānī in his book, ‘*Al-Mizan al-Kubra*’^{7c} has said that Imams Malik, Aḥmad b. Hanbal and Abū Hanīfah are of the view that evidence is no condition for revocation and that there is an assertion of Al-Shafi‘i too in accord with the same. In one report from Imam Aḥmad Bin Hunbal it is said that according to him evidence is a condition for revocation but according to the followers of Al-Shafi‘i and Aḥmad Ibn Hanbal the more accurate report is that the presence of witnesses at revocation is merely desirable. (Also see Section 104 *supra*).

According to Shi‘ahs as well evidence is no condition for revocation.^{7d} Indeed, the Zahirīyyah is the only sect who are of the view that without the presence of witnesses revocation of divorce cannot be effected.^{7e}

Effect of revocation of divorce on dower : It is written in the chapter on ‘Revocation’ in *Al-Durr Al-Mukhtār* with reference to *khulasah* that in the event of a revocable divorce deferred dower also changes into prompt dower. Consequently, once it is turned into prompt dower it cannot turn back to its original deferred character, for it had fallen due by the revocable divorce. Because once the condition of a time fixed is extinguished it does not revive⁸.

Section 119. On the pronouncement of one or two irrevocable
 Irrevocable divorce divorces by the husband to his wife the marriage contract terminates at once, whereas on the pronouncement of one or two revocable divorces the marriage contract terminates on the completion of the term of probation of the wife.

^{7b}Al-Shi‘rānī : *Al-Nīzam al-kubrā*, Cario, vol. ii, p. 128.

^{7c}Ibn Qudamah Al-Magdisi (d. 620 A.H.); *Al-Mughnī*, Cairo, 1367 A.H., vol. vii, pp. 228-30; *Sharḥ al-kharshī*, (on Khālil’s *Al-Mukhtaṣar*, Cairo, 1317 A.H., vol. iii, p. 227; Al-Inṣāf, Cairo, 1960 A.D., vol. ix, p. 152.

^{7d}Al-Hillī : *Slara’i’ al-Islām*, Tehran, Pt. iii, *Kitab Al-Talāq*, p. 211.

^{7e}Ibn Hazm (d. 456 A.H.): *Al-Muḥallā*, Cairo, 1352 A. H., vol. x, p. 216.

⁸Al-Haskafī : *Al-Durr al-Mukhtar*, (on margin of *Radd al-Muhtār*) *kitab al-Talaq* Chapter or *Raj‘at* :

”ويتعجل الموجل بالرجعى ولاية اجل برجعها“

COMMENTARY

There is no difference of opinion among the jurists on the point that divorce before penetration, divorce for consideration and the pronouncement of three divorces, one after the other, are irrevocable divorces and the husband cannot have recourse to his wife within the term of probation. Likewise, revocable divorce, too, becomes irrevocable after the lapse of the term of probation and the husband after that cannot have recourse to his wife. However, the parties may by mutual agreement, except in the case of the pronouncement of three divorces, re-enter into marriage contract afresh.

Hanafi View :

Burhanuddīn Al-Marghinānī, the author of *Al-Hidayah* writes: "If a person tells his wife that she is divorced irrevocably or she is divorced finally, according to Ḥanafīs, an irrevocable divorce shall take effect."

According to Ḥanafīs, this person has qualified the divorce with such a qualification that can, on principle, meaningfully, qualify the divorce. (There are always two possibilities in divorce. One is its revocableness and the other is its irrevocableness). The word 'Irrevocable' has determined one of the two possibilities i.e. irrevocableness of the divorce. The author of *Al-Hidayah* also refers to a maxim of Abū Hanīfah in this respect viz :

"When the quantum of "Divorce" pronounced is likened to any object one irrevocable divorce shall result irrespective of the type of the object likened or size of that thing; because (in the context) only seriousness would be the intention as envisaged mentioning likeness at all. According to Abū Yūsuf, however, if the person speaks of the bigness of the thing likened to, an irrevocable divorce shall take effect, otherwise not. But Zufar holds that if the thing likened to is such that its bigness is well known an irrevocable divorce shall take effect. Muḥammad's view on this point is in accord with the view of Abū Hanīfah.⁹

Maliki View :

According to the Mālikiyyah and the Shāfi'iyyah, divorce pronounced before penetration, divorce for consideration and divorce pronounced thrice at a time, are classed as irrevocable. The Ḥanafīs, besides the irrevocability of the above stated divorces, believe that the divorce is irrevocable when the husband qualifies the divorce with the word, "irrevocable".¹⁰ Abū 'Ubaidullah in his book, "*Rahmatul 'Ummat*" writes that

⁹Al-Marghinānī : *Al-Hidāyah*, Karachi, vol. ii, pp. 369, 371.

¹⁰Al-kaṣānī : *Bada'i' al Ṣanā'i'*, Cairo, 1328 A.H., vol. iii, pp. 109-10.

Mālik has said that in case of definite allusion (to divorce) too, irrevocable divorce gets effected.¹¹

Shafi'i View :

According to Al-Shāfi'ī, if the wife has been cohabited with, a revocable divorce shall take effect, because a divorce is proper only when there is an opportunity of having recourse to. To qualify divorce with irrevocability shall be against Sharī'ah and as absurd as some one says, "You are divorced on the condition that I shall have no right of having recourse to you". Al-Shāfi'ī, except in the above stated three cases of divorce, is not convinced of the irrevocability of divorce.¹²

Ahmad b. Hanbal's View :

Two opinions are reported from Ahmad Bin Hanbal in this respect. In one, he is in accord with that of Al-Shāfi'ī and in the other with that of the Ḥanafīs.¹³

Shi'i View :

The *a'immaḥ* of the Ja'firiyyah sect recognise the following four cases in which the divorce pronounced is irrevocable :—

1. When no cohabitation has taken place.
2. When the minor girl has not menstruated due to her being minor.
3. When the divorce is for consideration.
4. When the age of the wife exceeds fifty years.

Zaidi View :

The Zaidis agree with the Shafi'ī view.¹⁵

Zahiri View :

According to Zāhiriyyah sect, the divorce is irrevocable only in two circumstances: one when the divorce is pronounced before penetration

¹¹Abū Ubaydullah : kitab *Rahmat al 'Ummah, fi Ikhtilaf al-A'immaḥ* (on margin of *Al-Mizām al-kubrā*), Cairo, p. 52.

¹²Al-Marghinānī (d. 593 A.H.) : *Al-Hidāyāhū* Karachi, vol. ii, p. 369.

¹³Abū 'Ubaydullah; *Kitab Raḥmat al-'Ummah fi Ikhtilāf al-A'immaḥ*, (on margin of *Al-Mizām al-Kubra*), Cairo, p. 53; Abū al-Barkāt: *Al-Muḥarrar fil fiqh al-Ḥanbali*, Cairo, 1950 A.D. p. 55.

¹⁴Muḥammad Idrīs, Shaykh : *Al-Sarā'ir*, Iran, p. 355.

¹⁵Murtaḍa (d. 840 A.H.), *Al-Baḥr al-Dhakḥkhūr*, Cairo, 1948 A.D., Vol. iii, p. 203.

and the other when the divorce is pronounced thrice either at a time or at intervals.¹⁶

Ibn Taymiyah's View :

Ibn Taymiyah in his "Fatāwa" has written;—

"God has made it explicit that after cohabitation the divorce effected is only revocable and in the Book of God, except that of the divorce before penetration, there is no mention of any irrevocable divorce.¹⁷

Contentions :

The *ā'immaḥ* and jurists who, except for (a) divorce on consideration, and (b) divorce before penetration, are not convinced of the irrevocability of divorce, advance the argument in support of their contention that, besides these two categories, only revocable divorce is mentioned in the Holy Qur'an. Hence pronouncing any divorce inconsistent with the Qur'ānic mandate is against the Shari'ah. Any such divorce pronounced shall, therefore, be held to be revocable and the husband's right of having recourse to, during her term of probation, shall not lapse. But the *a'immaḥ* and the jurists, who are convinced of a divorce, besides the two above, being irrevocable because of the word "Irrevocable" attached to it, argue that having recourse to is a right of the husband and he is entitled to waive his right by his words.

The basis of difference :

The basis of difference is that the jurists according to whom divorce resembles an act which becomes incumbent upon the person by his volition, to them a divorce pronounced alongwith the qualifying word, "irrevocable" shall take effect as such, as the word "irrevocable" is the adjective of the word "divorce" and the qualifying word cannot be separated from the word which it qualifies. The entire words of the person saying them shall, therefore, be relied upon. But the jurists according to whom divorce resembles those acts which are dependant on the form defined by the Shari'ah for them, only a revocable divorce shall take effect, inspite of the fact that the husband may have used the word, "irrevocable" with the word "divorce".

Effect of irrevocable divorce :

The effect of an irrevocable divorce is that the husband cannot have recourse to his wife during the term of her probation because the marriage

¹⁶Ibn Ḥazm (d. 456 A.H.) : *Al-Muḥallā*, Cairo, 1352 A.H. vol. x, p. 216.

¹⁷Ibn Taymiyah (d. 728 A.H.) : *Fatāmā*, vol. iii, p. 33.

contract terminates then and there. But after the lapse of the term of probation the parties may by mutual consent re-enter into marriage contract afresh, provided the husband has pronounced only one or two irrevocable divorces, and not three, in which case an intervening marriage is necessary. For detailed discussion see section 120 *infrā*.

Section 120. If the husband by one phrase pronounces three Irrevocability of divorces or pronounces three times, "Divorce, divorce (Impure). Divorce, Divorce" to his wife, three irrevocable divorces (Impure) shall then and there take effect. He shall not be entitled to have recourse to or even re-marry his divorced wife except when she contracts a marriage consummated with another person and then secures divorce from him or the marriage contract is dissolved or the husband dies, in which case they may by consent re-marry on the expiration of her term of probation of the death of or divorce by the other husband.

COMMENTARY

Whether the word, "Three" used with pronouncement of divorce, or by repeating thrice the word, "divorce," one divorce only or three divorces or none at all take effect, is a question of serious controversy. The controversy has given rise to three schools of thought as below:—

- I. Divorce does not take effect at all.
- II. Only one divorce takes effect.
- III. Three irrevocable (impure, heterodox) divorces take effect.

The first school of thought is that of the Shi'ah only. Ibn Qudāmah Maqdisī in his book, "*Al-Mughnī*"¹⁸ has mentioned the names of 'Aṭa, Tā'ūs, Sa'id b. Jubair, Abū al-Sha'shā, 'Amru b. Dinār amongst those who are convinced that the second school of thought is on the right path. Qurtubi¹⁹ has quoted in his *Tafsīr Jami'al Qur'ān* the opinion of 'Umar b. Ishaq and Ḥajjāj Ibn Artāt along the same lines. (According to a well known report however, Ḥajjāj Ibn Artāt is said to be convinced of the effectiveness of three divorces pronounced by one word). Qurtubi has also written that there is reported one assertion of 'Āli, 'Abdullah Ibn Mas'ūd and Ibn 'Abbās amongst the Companions of the Holy Prophet. (Although the well

¹⁸Ibn Qudāmah : *Al-Mughnī*, Cairo, 1367 A.H., vol. vii, p. 94.

¹⁹Al-Qurtubi; *Jāmi' al-Ahkām al-Qur'an*, Cairo, 1936 A. D., vol. iii, pp. 132-33,

established assertion of Ibn 'Abbās is to the effect that he is convinced of the effectiveness of three divorces pronounced by one word). This rule of conduct has also been supported by Zubayr b. Awam and 'Abdur Raḥmān b. 'Awf. Ibn Taymiyah and his disciple Hāfiz Ibn al-Qayyim, the later period celebrities, are also convinced of the view that three divorces pronounced at a time constitute one divorce only. But the verdict (*fatwā*) of the multitude of Companions, of their Successors, of the jurists and of the traditionists has continued to be to the effect that the pronouncement of three divorces at a time shall constitute three divorces.

The first school of thought—No divorce takes effect :

No divorce takes effect : Najmuddin Abū Ja'far Al-Hilli in his famous work "Shara'i' al-Islam" has said that the pronouncement of three divorces in which there is no opportunity of having recourse to wife, pronouncement of divorce during the wife's menses and the pronouncement of divorce during such period of purity of the wife in which the husband has had sexual intercourse with her, are according to Shi'ah sect, void. Such divorce does not take effect.²⁰

Ibn Qudāmah Maqdisi in his famous work "*Al-Mughnī*" has written that Ibn 'Ulayyah, Hishām b. al-Hakam and the Shi'ah say that the triple divorces pronounced at a time by a husband to his wife shall not take effect.²¹

Those who are convinced that a divorce does not take effect at all even when a triple divorce is pronounced rely on certain Qur'ānic verses and Prophet's traditions in support of their opinion.

Qur'ānic verses : They say that God in the Holy Qur'ān lays down,²² "A divorce is only permissible twice". After that He says, "the parties should either hold together on equitable terms or separate with kindness."²³ As three divorces with one phrase do not find place in the Holy Qur'ān the same shall not take effect.²⁴

²⁰Al-Hilli : *Sharā'i' al-Islam*, Iran, Pt. iii, p. 209.

²¹Ibn Qudāmah : *Al-Mughnī*, Cairo, 1367 A.H., vol. vii, pp. 99-100.

²²Al-Qur'ān, surah *Al-Baqarah* (The Cow), ii : 229.

“الطلاق مرتان”

²³Ibid:

“فامساک بمعروف او تسریح باحسن”

²⁴Al-Qurtubi : *Jāmi' al-Aḥkām al-Qur'ān*, Cairo, 1936 A.H., vol. iii, p. 129 :

“ومن طلق ثلاثاً في كلمة فلا يلزم اذ هو غير مذکور في القرآن”

These persons, in support of their view, also argue on the basis of another Qur'ānic verse, "when ye divorce women, and they fulfil the term of their 'iddat, either take them back on equitable terms or set them free on equitable terms."²⁵ These persons assert that the method or the statement of pronouncing three collective divorces not being mentioned in the verse, the effectiveness of such divorce shall not ensue therefrom.²⁶ Such a pronouncement contravenes a Qur'ānic direction and therefore will have no legal significance against the dictates of God.²⁷

Prophet's Traditions : Exponents of this school in support of their point of view also cite the following tradition of the Holy Prophet : "It is narrated by Maḥmūd b. Labīd that the Prophet was informed about a person who had pronounced three divorces on the spur of the moment to his wife. The Prophet having heard this got up in anger and said, "Is God's Book being made a plaything even when I am present amongst you. Thereupon a person stood up and said, 'O, Prophet ; should I not behead that person?'"²⁸

They also rely on another tradition and say that the pronouncement of three divorces at once by one word is an innovation which falls within the purview of complete prohibition. The Prophet has said, "The person who acts as is not bidden by me, the act stands repudiated".²⁹ Hence, three divorces pronounced at once by one phrase is an act that is against the tradition of the holy Prophet. It shall thus be rejected as illegal and of no effect.³⁰

²⁵Al-Qur'an, Surah *Al-Baqarah* (The Cow), II : 231,

"وإذا طلقتم النساء فبلغن أجلهن فامسكوهن بمعروف أو سرحوهن بمعروف"

²⁶Ibn Hazm : *Al-Muḥallā*, Cairo, 1352 A.H., vol. x, p. 167.

²⁷Ibn Qudamah : *Al-Mughnī*, Cairo, 1367 A.H., vol. vii, p. 100.

²⁸Al-Nasā'ī : *Al-Sunan*, (kitab al-Talaq) Karachi, vol. ii, p. 81 :

"عن ابن وهب قال اخبرنا مخزومة عن ابيه قال سمعت محمود بن لبيد قال اخبر رسول الله صلى الله عليه وسلم عن رجل طلق امرأة ثلاث تطليقات جمعاً فقام غضبنا ثم قال ايلعب بكتاب الله وانا بين اظهركم حتى قام رجل وقال يا رسول الله الا اقله"

²⁹Al-Khatib : *Mishkat*, Karachi, vol. i, Chap. on *Al-I'tisām bil kitab wal sunnah* :

"عن عائشة قالت قال رسول الله صلى الله عليه وسلم من احدث في امرنا هذا ما ليس

منه فهو رد"

³⁰Ibn al-Humām : *Fatḥ al-Qadīr*, Cairo, 1356 A.H., vol. iii, pp. 24-25;
Al-Kasānī : op. cit. vol. iii, p. 96.

Criticism on the First School's Opinion :

Most of the jurists have, in their books argued against the view that on the pronouncement of three divorces at a time none of them takes effect. Here are the extracts from some of them viz. Al-Muḥallā of Ibn Ḥazm, (d. 456 A.H.) Al-Mabsūt of Al-Sarakhsī (d. 482 A.H.) Bada'i'al Ṣana'i' of Al-Kāṣānī, (d. 587 A.H.) and Al-Mughnī of Ibn Qudāmah (d. 620 A.H.).

Ibn Hazm : Imam 'Alī Ibn Aḥmad known as Ibn Ḥazm repudiates the contention of the persons who hold that a triple divorce by a single phrase or three words at a time shall not constitute even a single divorce. He writes in his noted book, *Al-Muḥallā* : "Those who are not convinced of the effectiveness of the divorce pronounced thrice at a time in their support cite the Qur'anic verses, "(O ' Prophet : when ye do divorce women, divorce them at prescribed periods,"³¹ and "Divorced women shall wait concerning themselves for three monthly periods,"³² and "when ye divorce women and they fulfil the term of their 'iddat either take them back on equitable terms or set them free on equitable terms."³³ "A divorce is only permissible twice, after that the parties should either hold together on equitable terms or separate with kindness."³⁴ They argue that only those divorces shall be effective which correspond to the methods described in these verses. (As there is no method given or recital made about pronouncing three divorces collectively in the Holy Qur'ān, they shall not be given effect to.) Ibn Hazm in reply to the above contention says, "These verses have been revealed to clarify the pronouncing one or two divorces and that is all".

Ibn Hazm raises a question here that suppose a person first pronounces a divorce to his wife and later has recourse to her. He again pronounces a second divorce and again has recourse to her. For the third time he again divorces her. Has he committed any innovation? Those who uphold the first view shall surely answer, "No, it is not committing innovation; rather it would be observing *sunnah*". Ibn Hazm, then, says, "I would now put the question to these persons whether they would tell us how do they consider the above mentioned divorce to be a *Talaq al Sunnah*

³¹Al-Qur'an : surah *Al-Talaq*, (The Divorce), LXV : 1.

"يا ايها النبي اذا طلقتم النساء فطلقوهن لعدتهن"

³²Al-Qur'an, *sunnah*, *Al-Baqarah* (The Cow), 11 : 228,

"والمطلقات يتربصن بأنفسهن ثلاثة قروء"

³³Ibid, II : 231.

"واذا طلقتم النساء فبلغن اجلهن فامسكوهن بمعروف او سرحوهن بمعروف"

³⁴Ibid, II : 229.

"الطلاق مرتان فامسكواكم بمعروف او تسريحواكم باحسان"

(divorce in accordance with the Prophetic tradition). This method is not mentioned in the verses stated above? Perforce the answer cannot but be that no such divorce is mentioned in the said verses. It may thus be said that the essence of the said verses is that those who pronounce revocable divorce ought to act in such and such manner. Hence no order, covering pronouncement of three divorces at a time, is proved from the above cited verses, and to assume any such meaning would be going too far.”

Proceeding further Ibn Hazm writes; “The group who argues from the verse, ‘A divorce is only permissible twice’ that Qur’an lays down that the divorce should be pronounced one after the other, according to me is wrong, as the true meaning of the verse at best is, that three divorce may be pronounced. In other words, it is instructed through this verse that the pronouncement of divorce should be confined to less than three.”

Ibn Hazm further writes that there is no difference between him and the opposing group on the point that the best method of divorce according to tradition is that the wife, after the pronouncement of one divorce, be left till her period of probation expires. The other method is that after one divorce second divorce be pronounced during her period of purity and that’s all. These two methods as such are not specifically stated in the said verse. In spite of it these persons are convinced that the pronouncement of two divorces at a time shall as well be considered as divorce according to (and so approved) tradition, although the verse again does not specify about it. Thus, it is clear that these persons’ argument has no factual support from the words of the verse.

Those who, in the event of pronouncement of three divorces at a time, are not convinced of the effectiveness of even one divorce, cite in proof of their claim the tradition narrated by Maḥmūd Ibn Labīd (already mentioned in the beginning). Ibn Hazm meets this argument by saying that Ahmad Ibn Shu‘aib has criticised this tradition as narrated by Muḥramah alone; except for him no one else has narrated this tradition. Besides, this tradition is Mursal (i.e. a tradition narrated by a successor from the prophet without mentioning the name of the Companion, through whom *ḥadīth* has actually been narrated.) It is not worthy of being considered as proof, because its narrator Muḥramah did not trace it even to his own father who was a Companion of the Prophet.³⁵

Analysis :

To the present writer, if the tradition is examined closely, one can see that the Prophet (peace be upon him) was incensed at the procedure not

³⁵ Ibn Hazm : *Al-Muhalla*, Cairo, 1352 A.H., vol. x, pp. 197-211.

being according to the Qur'ān. But it cannot be said, from this tradition, that he considered the divorce ineffective. Had it been so the Prophet would have said it in as many words.

Al-Sarakhsi : Imam Shams al-Dīn al-Sarakhsi³⁶ in his noted book, "*Al-Mabsūt*" has a chapter under the title "In repudiation of one who says that when the divorce is against Sunnah, it is ineffective". He writes, "There is difference on this question between us and the Shi'ahs because of two reasons. One is that when a husband pronounces divorce to his wife during her menses or during that period of her purity during which he has cohabited with her, such a divorce, according to the multitude of jurists shall take effect; according to the Shi'ah, however, it shall not. The other reason is that when a husband pronounces triple divorces at a time to his wife, then according to us, all the three divorces shall take effect. According to Shi'ah Zaydiyah only one divorce and according to Imamiyah no divorce shall take effect. The Imamiyah call this to be according to an assertion of 'Alī. But attributing this opinion (i. e. the ineffectiveness of divorce) to 'Ali is a mere imputation. Muḥammad al-Shaybānī has, in 'The Book on Divorce', narrated from 'Ali and Ibn Mas'ūd that in case of the pronouncement of triple divorces at a time by the husband, the three divorces so pronounced at a time shall take effect. And there is a very well known assertion of Ali, "All divorces are valid except those that are pronounced by a child or by a person of unsound mind." From this it stands proved that every divorce except the one pronounced by the said two persons is valid. These persons also think that the husband is ordained by *Shari'ah* to effect divorce according to *sunnah*; and the method in which the husband has been bidden to pronounce divorce is according to *sunnah* only. His capacity is that of a representative (of *Shari'ah*). Consequently when he effects divorce contrary to *sunnah* it would not take effect because he has been ordained to pronounce divorce according to *Shari'ah* which is certainly incumbent on him. As the effectiveness of husband's action is due to the religious sanction and his taking a course which is not permitted is forbidden, therefore, a divorce not sanctioned by *Shari'ah* shall not be effective. This is just like the divorce pronounced by a child or by a person of unsound mind which is of no effect. Al-Sarakhsi in answer to this argument writes, "In this context we (the Hanafis) have two arguments. The first is that prohibiting to do a thing is a clear proof of the existence of the thing prohibited to be done because prohibition is not applicable unless the thing prohibited is in existence. Prohibition is the reason for one's stopping from doing an act which, in spite of his having power to act, is prohibited for him. If he abstains

³⁶Al-Sarakhsi : *Al-Mabsūt*, Cairo, 1324 A.H., vol. vi, pp. 57-58.

from doing that thing he is entitled to reward; if he takes steps to do it he will be punished. If the thing prohibited, therefore, itself is not in existence no question of his power of choosing to act arises. The second argument runs like this: Whereas prohibition is based on an element, extraneous to and not intrinsic to the thing prohibited, the prohibition itself is not negated nor rendered ineffective according to the *Sharī'ah*. For example, the offering of prayers on usurped land or engaging in purchase and sale after hearing the call to Friday prayers are explicitly forbidden. Notwithstanding such prohibition if one offers prayers on usurped land or engages in sale and purchase after hearing the call to Friday prayers, such transactions do take effect validly as the prohibition was based on extraneous matters. Here the prohibition to triple divorce at a time is deduced because of such extraneous considerations as the lengthening of probation period or doubts in computation of the same or the impossibility of remedying the damage by having recourse to or remarry the divorced woman. Hence taking effect of triple divorces shall not be forbidden. Innumerable illustrations of the same are to be found in *Kitāb al-Aṣl* of Imam Muhammad Al-Shaybānī and all these examples have reference to these two principles”.

Al-Sarakhsi, thereafter, writes : “This divorce is distinct from the one pronounced through an attorney. The attorney acts on the directions obtained from his principal. If the attorney acts against that purpose for which he is appointed the act shall not take effect. But the husband acts in this case on his own authority.³⁷ The husband becomes entitled to pronounce three divorces directly by himself on the basis of the marriage contract itself. His entitlement is sufficient authority for the divorces taking full effect, for he is neither an appointee nor a licensee. This fact is in perfect contrast to the capacity of a minor or of a person of unsound mind because the legal capacity in these two persons of pronouncing divorce is non-existent.

Al-Kasani : ‘Alā al-Din al-Kāsānī in his famous work, *Bada’i’ al-Ṣanā’i’* refuting the view of the first group of ‘*Ulama*’ and in support of his own arguments, cites the traditions narrated by ‘Ubādah Bin Ṣamit,³⁷ Ibn ‘Abbās³⁸ and the Caliph ‘Umar,³⁹ Thereafter he writes: “My answer to the argument advanced by the first group, that pronouncement of three divorces at a time is ineffective being illegal, is that the pronouncement of divorce in itself is a legal act. Its being forbidden is due to an attribute that stands

³⁷See p. 425 & footnote 52 *infra*.

³⁸See p. 426 & footnotes 53-54, *infra*.

³⁹See p. 426 & footnote 55 *infra*.

as an obstacle extraneous to inherent effectiveness (i.e. the act of divorce in itself is lawful but the attribute of its being unlawful is extraneous and foreign). This extraneous and foreign attribute, because of which pronouncing three divorces by one word is held unlawful and abominable, is an element introduced by the pronouncer of divorce against method prescribed by tradition. This gives rise (merely) to certain drawbacks. Hence the divorce in itself is lawful and all the religious dictates emanating therefrom shall be valid, though it is considered unapproved because of an extraneous element. It resembles closely to buying and selling at the time of call to Friday prayers. Though this is forbidden, but buying and selling done at that time shall be lawful and valid. Likewise, offering of prayers on illegally usurped land is also forbidden. If, however, the prayers are offered at such place they shall be considered as performed (though the performer shall be considered a sinner). The selling (and buying) and offering of prayers are in themselves lawful acts. The prohibition or abomination is due to the acts of the doer which is not a natural component of sale or prayers and is extraneous in its character".⁴⁰ Same situation applies to divorce.

Ibn Qudamah al-Maqdisi: In his famous book, *Al-Mughni*, Ibn Qudamah Maqdisi also refutes the argument of those persons who are convinced of the ineffectiveness of divorce pronounced in an unorthodox manner. He quotes, besides the above stated three traditions, the following traditions, namely that respecting the divorce pronounced by Ibn 'Umar to his wife during her menstruation period;⁴¹ the tradition respecting the divorce by imprecation pronounced by Uwaymir al-'Ajlānī;⁴² the tradition respecting the wife of Rifa'ah narrated by 'Āishah;⁴³ and the tradition respecting Fātimah Bint Qays.⁴⁴ He then proceeds to argue that the heterodox divorce is in itself legally valid, whether it be pronounced during the menstruation period or as three divorces collectively. Ibn Qudamah al-Maqdisi has thus proved that the view of the 'Ulamā' of the first school of thought that three divorces pronounced at a time shall not take effect, is null and void.⁴⁵

⁴⁰Al-Kasānī : *Badā'i' al-Ṣanā'i'*, Cairo, 1328 A.H., vol. iii, p. 96-97.

⁴¹See p. 427 & footnote 56, *infra*.

⁴²See p. 316 & footnote 257, *supra*.

⁴³Muslim : *Ṣaḥīḥ*, (with commentary by Nawawī), Cairo, Kitāb al-Talāq.

⁴⁴See p. 428 & footnote 60, *infra*.

⁴⁵Ibn Qudamah al-Maqdisi : *Al-Mughni*, Cairo, 1367 A.H., vol. vii, p. 100-2.

Conclusion :

In the light of the above stated testimonies and arguments the present writer also concludes against the view of those who believe in the rule that by the pronouncement of three divorces with one word or by the pronouncement of three separate divorces at one time none of the divorces take effect. This view is based upon misconception and stands repudiated by a preponderant majority of the 'Ummah. None in the Muslim community except the Shi'ah Imāmiyah subscribes to that view and it has been generally rejected.⁴⁶

The second school of thought—Only one divorce shall take effect :

The jurists who are convinced that in the event of three divorces being pronounced only one revocable divorce takes effect rely on the following Qur'ānic verses and traditions of the Prophet.

Qur'anic verses : People who believe that in the event of three divorces being pronounced only one divorce takes effect, argue that the pronouncement of three divorces at a time is against the specific dictates of the Qur'ān. Such divorces, therefore, shall be adjudged in accordance with traditional method of divorce and only one revocable divorce shall take effect. These persons in support of their view cite the Qur'anic verse, "A divorce is only permissible twice : after that the parties should either hold together on equitable terms or separate with kindness."⁴⁷ and "When ye divorce women, and they fulfil the term of their 'iddat, either take them back on equitable terms or set them free on equitable terms."⁴⁸ These persons say that God has commanded in the Qur'an that divorces should be pronounced in such a way that there may remain to the husband a clear option of having recourse to the divorced wife before the expiry of her term of probation. On this ground one revocable divorce shall take effect, as implementation of all the three divorces at a time is against the commandment of the Book of God.

Traditions : These persons base their views on the following traditions as well ;—

1. It is stated by Abu al-Zubayr that he said, "I asked Ibn 'Umar about a person who pronounced three divorces to his wife during

⁴⁶Ibn al-Humām : *Faṭḥ al Qādir*, Cairo, 1356 A.H., vol. iii, pp. 24-25; Al-Kasani : op. cit. vol. ii, p. 96.

⁴⁷Al-Qur'ān, surah Al-Baqarah (The Cow), II : 229,

”الطلاق مرتان فاساك بمعروف او تسريح باحسن“

⁴⁸Ibid, II : 231,

”اذا طلقتن النساء فبلغن اجلهن فاسكوهن بمعروف او سرحوهن بمعروف“

the period of her menses. Ibn 'Umar asked, "Do you know Ibn 'Umar"? I said, "Yes". He said, "I pronounced three divorces to my wife during Prophet's days. At that time she was in her menses. The Prophet turned it (the divorce) to the *Ṣunnah*."⁴⁹

2. It is reported by Da'ūd b. al-Ḥaṣīn through 'Ikramah that Ibn 'Abbās said that Rukāna Ibn Yazīd pronounced three divorces in one sitting to his wife. Thereafter, Rukāna felt great pangs of conscience at his action. He enquired of it from the Prophet. The Prophet asked him, "How did you pronounce the divorces?" Rukana replied, "I pronounced three divorces." The Prophet asked, "Did you do it in one sitting?" He replied, "Yes". The Prophet said, "They constitute one divorce, if you wish you may have recourse to her". Rukana said, "I do have recourse to her."⁵⁰
3. It is reported by Ibn Ṭa'ūs from his father that Ibn 'Abbās said that the three divorces were considered one divorce during the time of the Prophet, Abu Bakr and during the first two years of the Caliph 'Umar. Thereafter 'Umar spoke to other Companions of the Prophet that people have started taking hasty action in a matter (divorce) which requires great deal of thought and deliberation. It should be better if we enforced them (the three divorces as such). Consequently 'Umar enforced the effectiveness of the three divorces. Ibn Ṭa'ūs from another chain of narrators has reported from his father that Abū al-Ṣahbā' said to Ibn 'Abbas "Don't you know that the three divorces were considered as one in the time of the Prophet and Abu Bakr and the same was prevalent practice during the initial period of the caliphate of 'Umar?" Ibn 'Abbas replied, "Yes". Ibn Ta'ūs has reported the same facts through a third and fourth chain

⁴⁹Dar Qutni : *Al-Sunan*, Delhi, 1310 A.H., vol. ii, p. 427.

”عن ابى الزبير قال: سألت ابن عمر عن رجل طلق امراته ثلاثا وهي حائض، فقال لى : اتعرف ابن عمر (رضى الله عنه)؟ قلت : نعم، قال طلقت امرأتى ثلاثاً على عهد رسول الله صلى الله عليه وسلم (وهى حائض) فردها رسول الله صلى الله عليه وسلم الى السنة.“

⁵⁰Al-Bayhaqi : *Al-sunan al-kubrā*, Hyderabad Deccan, 1353 A.H., vol. vii, p. 339 :

”عن ابن عباس قال طلق ركانة امراته ثلاثا فى مجلس واحد فحزن عليها حزناً شديداً فساله رسول الله صلى الله عليه وسلم ”كيف طلقته؟“ قال طلقته ثلاثاً : فقال فى مجلس واحد؟ قال نعم : قال فانما واحدة فارجعها ان شئت فارجعها“

of narrators.⁵¹ (This is the leading tradition relied upon by the second school of thought).

Third school of thought—Three divorces take effect irrevocably:

The jurists and the learned doctors of *Shari'ah*, who are convinced that all the three divorces take effect at the same time, cite several traditions of the Prophet and his Companions in their support. Complete texts of the same are given in the footnotes, extracts whereof are as follows :—

1. It is narrated by 'Ubādah b. Ṣāmit that someone of his forefathers pronounced one thousand divorces to his wife. The Prophet was told about it. He said, "In spite of the act being a sin, the woman on account of three of the divorces pronounced became irrevocably divorced. The rest 997 of the divorces are sins on his neck."⁵²
2. It is narrated of Ibn 'Abbas that he said, "He among you is a fool who pronounced one thousand divorces to his wife and

⁵¹Muslim : *Sahih* (with Commentary by Nawawī), Cairo, 1924 A.D., vol. x, pp. 70-72:

”حدثنا اسحق بن ابراهيم و محمد بن رافع ”واللفظ لابن رافع“ قال اسحق اخبرنا وقال ابن رافع حدثنا عبدالرزاق اخبرنا معمر عن ابن طاؤس عن ابيه عن ابن عباس قال ”كان الطلاق على عهد رسول الله صلى الله عليه وسلم و ابي بكر و سنتين من خلافة عمر طلاق الثلاث واحدة فقال عمر بن الخطاب ان الناس قد استجعلوا في امر قد كانت لهم فيه اناة فلو اضميناه عليهم فامضاه عليهم-

حدثنا اسحق بن ابراهيم اخبرنا روح بن عبادة اخبرنا ابن جريج حدثنا ابن رافع ”واللفظ له“ حدثنا عبدالرزاق اخبرنا ابن جريج اخبرني ابن طاؤس عن ابيه ان ابا الصهباء قال لابن عباس انما كانت الثلاث تجعل واحدة على عهد النبي صلى الله عليه وسلم و ابي بكر و ثلاثاً من اشارة عمر فقال ابن عباس نعم-

وحدثنا اسحق بن ابراهيم اخبرنا سليمان بن حرب عن حماد بن زيد عن ايوب السخثمياني عن ابراهيم بن مغيرة عن طاؤس ان ابا الصهباء قال لابن عباس هات من هاتك الم يكن الطلاق الثلاث على عهد رسول الله صلى الله عليه وسلم و ابي بكر واحدة فقال قد كان في ذلك فلما كان في عهد عمر تتابع الناس في الطلاق فاجازه عليهم“

⁵²Al-Dār Qutnī : *Sunan*, Delhi 1310 A.H., vol. ii, p. 343 :

”عن عبادة بن الصامت عن ابيه عن جده قال طلق بعض آبائي امراته الفاً فانطلق بنوه الى رسول الله عليه وسلم فقالوا يا رسول الله ان ابانا طلق امنا الفاً فهل له من مخرج فقال ان اباكم لم يتق الله فيجعل له من امره مخرجاً بانك منه بثلت على غير السنة تسعمائة و مبيعة و تسعون اثم في عقه“

comes running to me calling out Ibn 'Abbas, Ibn 'Abbas ! Though God has said for "those who fear Allah, He (ever) prepares a way out" (LXV : 2) You did not fear God (in pronouncing divorce in a heterodox manner; hence I do not find a way out for you. Your wife has become irrevocably divorced (separated) from you and you have become a sinner".⁵³

3. It is reported from Ibn 'Abbas that he was questioned by a person who had pronounced one hundred divorces to his wife. He said, "you have disobeyed your God and your wife has become irrevocably divorced (separated) from you. You did not fear God so that He would have prepared a way out for you." Thereafter Ibn 'Abbas read out the verse, (meaning), "O Prophet ! when ye do divorce women, divorce them at their prescribed periods." (LXV : 1).⁵⁴
4. It is stated of the Caliph 'Umar that a person, who had pronounced one thousand divorces to his wife, was brought to his presence. He said, "You have made fun (of a serious matter)." He hit him with a whip and said, "It was enough for you to have pronounced three divorces."⁵⁵
5. Ibn 'Umar pronounced one divorce to his wife during her menses with the intention of pronouncing the other two divorces during the rest of the periods. The Prophet heard of it. He said, "O, Ibn 'Umar ! you have acted against the tradition." And asked him to have recourse to his wife. Ibn 'Umar said, "O, Prophet, tell us, had I pronounced three divorces to my wife,

⁵³Al-Bayhaqi : op. cit. vol. vii, p. 331 :

"عن مجاهد قال كنت عند ابن عباس رضى الله عنها فجاءه رجل فقال انه طلق امراته ثلاثا قال فسكت حتى ظننا انه رادها اليه ثم قال : ينطلق احدكم فيركب الحمولة ثم يقول يا بن عباس وان الله جل ثناؤه قال (ومن يتق الله يجعل له مخرجا) و انك لم تتق الله فلا اجد لك مخرجا عصيت ربك وبانت منك امراتك،"

⁵⁴Ibid : p. 321,

"عن مجاهد عن ابن عباس رضى الله عنه انه سئل عن رجل طلق امراته مائة تطليقة : قال عصيت ربك وبانت منك امراتك لم تتق الله فيجعل لك مخرجا ثم قراء (يا ايها النبي اذا طلقتم النساء فطلقوهن لعدتهن)"

⁵⁵Ibid : p. 334,

"عن زيد بن وهب ان بطالا كان بالمدينة فطلق امراته ألفا فرجع ذاك الى عمر بن الخطاب رضى الله عنه فقال انما كنت العب فعلاه عمر رضى الله عنه بالدرّة و قال ان كان ليكيفيك ثلاث،"

would it have been lawful for me to have recourse to her ?” The Prophet said, “No ! She would have become irrevocably divorced (separated) from you and the act would have been a sin.”⁵⁶

6. When ‘Uwaymir al-‘Ajlānī and his wife (on account of the accusation of adultery which ‘Uwaymir had made against his wife) had imprecated each other, ‘Uwaymir said “O Prophet of God, If I now retain her, I shall be held a liar”. Hence he, before the Prophet said anything, pronounced three divorces to her. The Prophet did not repudiate this act of ‘Uwaymir.⁵⁷
7. A certain person told Ibn ‘Abbas that he had pronounced one hundred divorces to his wife.⁶⁰ Ibn Abbas told him “retain the three and throw away the ninety seven.”⁵⁸
8. A certain person came to Abdullah b. Mas‘ūd and said that he had pronounced eight divorces to his wife. Ibn Mas‘ūd asked him as to what was he told about it? He replied that he was told that his wife had become irrevocably divorced to him. Ibn Mas‘ūd said, he was correctly told. The person who pronounces divorce in the manner God has commanded, God’s command is manifest for him. Those who engage themselves in devilary (covering truth with falsehood), devilary is set on them. Do not engage in devilary, if you do engage yourself in that, it shall

⁵⁶Ibid : p. 334,

”عن عبد الله ابن عمر انه طلق امراته تطليقة وهي حائض ثم اراد ان يتبعها بتطليقتين اخرائين عند القرئين الباقيين فبلغ ذلك رسول الله عليه وسلم فقال يا ابن عمر ما هكذا امر الله تبارك وتعالى انك قد اخطأت السنة، والسنة ان تستقبل الطهر فتطابق لكل قرع قال : فامرني رسول الله صلعم فراجعتها ثم قال لي اذا هي طهرت فطلق عند ذلك او امسك- فقلت يا رسول الله افرايت لو اني طلقته ثلاثا كان يحل لي ان اراجعتها قال لا كانت تبين منك و تكون معصية“

⁵⁷Ibid : p. 328; Also see footnote 25, p. 316, supra.

⁵⁸Ibid : p. 337,

”عن عبد الحميد بن رافع عن عطاء ان رجلاً قال لابن عباس طلقت امرأتي مائة قال تاخذ ثلاثا و تدع سبعاً و تسعين“

be made incumbent upon you.⁵⁹ (Have caused them confusion in a matter which is already to them obscure and confused VI : 9).

9. Ḥafṣ b. Al-Mughīrah pronounced three divorces by one word to his wife, Fatima bt. Qays, during the time of the Prophet of God. The Prophet got his wife separated from him. Nothing has come down to us to show the Prophet found fault with it.⁶⁰
10. ‘Abdullah Ibn ‘Umar was asked about three divorces. He said, “If you had pronounced three divorces, she would be forbidden to you till she marry another person. You disobeyed God in the matter of the pronouncement of divorces to your wife.”⁶¹
11. A person, who had pronounced three divorces to his wife in one sitting, went to ‘Amrān b. Al-Ḥaṣīn. ‘Amrān told him that he had committed sin to God and had made his own wife forbidden to himself.⁶²
12. A certain person came to ‘Ali and said that he had pronounced one thousand divorces to his wife. ‘Ali said that the three

⁵⁹Mālik : *Muwaṭṭa*, (with Commentary by Zaraqānī) Cairo, 1382 A.H., vol. iv, p. 68 :

”وحدثني عن مالك انه بلغه ان رجلاً جاء الى عبد الله بن مسعود فقال : اني طلقت امرأتي ثمان تطايقات فقال ابن مسعود فاذا قيل اك ؟ قل قبل لي اها قد بانت مني فقال ابن مسعود صدقوا من طلق كما امره الله فقد بين الله له ومن لبس على نفسه لباساً جعلنا لبسه ملحقاً به لا تلبسوا على انفسكم وتحملة هو كما يقولون“

⁶⁰Dār Qutnī : *Al-Sunan*, Delhi, 1310 A.H., vol. ii, p. 429 :

”ان حفص بن المغيرة طلق امراته فاطمة بنت قيس على عهد رسول الله عليه وسلم ثلاث تطليقات في كلمة واحدة فابانها منه النبي صلى الله عليه وسلم، لم يبلغنا ان النبي صلى الله عليه وسلم عاب ذلك منه“

⁶¹Muslim : *Al-Sahīḥ*, Karachi, vol. i, p. 476; Bayhaqī, *Al-Sunan al-kubrā*, Deccan, 1353 A.H., vol. vii, p. 330-31 :

”وكان ابن عمر اذا سئل عن ذلك قال احدهم ان كنت طلقتهما ثلاثاً فقد حرمت عليك حتى تكح زوجاً غيرك وعصيت الله عزوجل فيما امرك من طلاق امرأتك“

⁶²Bayhaqī : *Al-Sunan*, op. cit. vol. vii, p. 332 :

”ان رجلا تى عمران بن الحصين رضى الله عنه و هو فى المسجد فقال رجل طلق امراته ثلاثا و هو فى مجلس قال اثم بربه و حرمت عليه امراته“

divorces had made that woman forbidden to him and the rest of the divorces he may distribute to his other wives.⁶³

13. 'Āishah Khath'amīyah was married to Ḥasan b. 'Alī. When 'Alī was martyred, 'Āishah said to Ḥasan, "Congratulation to you on your Caliphate." Ḥasan told her, "you are divorced i. e. thrice." The narrator reports that she picked up her clothes and started observance of her term of probation. The term of probation, having ended, Ḥasan sent dower due and ten articles as gift. When the courier reached her she said, "Small return for separation from a dear one". When the news reached Ḥasan he wept and said, "If I had not heard from my grandfather (or from father) that if a person pronounces three divorces to his wife either during her menstruation or thrice at a time, she does not remain lawful to him till she has been married to another person, (and regains her liberty), I would have had recourse to her ('Āishah)." ⁶⁴
14. It is stated of Mu'ādh b. Jabal that he said that he heard the Prophet say, "O ! Mu'ādh ! the one who pronounces one, two or three divorces, I would bind him with that heresy." ⁶⁵

Criticism :

Those who are convinced that in the event of three divorces being pronounced at a time only one is effective, generally in support of their claim quote the Qur'anic verses, "A divorce is only permissible twice..." (II : 229) and "When you divorce the women and they fulfil the term of their ('iddat), either take them back on equitable terms or set them free on equitable terms... (II : 231) and a few traditions that have already been quoted (See pp. 423-24 *Supra*).

So far as they rely on the above stated Qur'anic verses supporting their claim, the answer as given by Ibn Ḥazm is enough viz. that the said Qur'anic verses pertain only to the method of pronouncing one or two

⁶³Bayhaqi : *Al-Sunan*, op. cit. vol. vii, p. 334 :

"أعرج رجل إلى علي رضي الله عنه فقال طنقت امرأتي الفأ قال ثلاث تحرمها عليك وأقسم سائرهما بين نسائك"

⁶⁴Ibid, p. 335.

⁶⁵Dar Qutnī : *Al-Sunan*, Delhi, 1310 A.H., vol. ii, p. 444 ;

"عن انس قال معاذ بن جبل يقول سمعت رسول الله صلى الله عليه وسلم يقول : يا معاذ من طلق البعدة واحدة أو اثنين أو ثلث الزمناه بدعته"

divorces.⁶⁶ It is a fact that the Qur'ān has prescribed the most preferable mode of pronouncing divorce. It cannot be taken to mean that the Qur'ān holds the pronouncement of two or three divorces at a time to be ineffective. Besides, how can the description of a prescribed mode can support the negation of another mode and label its existence non-existent being against the terms of the first mode. The Qur'ān forbids the doing of an act and the act is done, how can it be held to be non-existent and without any legal consequences. For instance, the Qur'ān forbids committing of "adultery" and "theft." If someone does commit such acts (which are clearly against the tenets of the Qur'ān), shall it be said that the acts have no legal consequences or that the acts did not occur at all? Likewise is the case with making purchases and sales after the call to Friday prayers or the offering of prayers on usurped land. In other words, if a person adopts the mode of divorces, contrary to the excellent method of pronouncing divorce laid down in the holy Qur'ān, for example he pronounces at a time two divorces in the manner, "you are twice divorced" or "you are divorced, divorced" or uses the digit of three or pronounces divorce by using several words at a time or pronounces during (the wife's) menstruation or two or three divorces at a time or during the wife's period of purity after having intercourse with her adopts some of the modes (of pronouncing divorce) stated above, there is no specific commandment as regards them in the "Book of God". In such cases, besides analogical deductions, we shall have to seek aid from the Prophet's traditions and those of Companions. Such authentic traditions do exist which spell out the effectiveness of the divorces in the above stated cases beyond any doubt. Hence, merely on the ground that these cases are not described in the "Qur'ān" the non-effectiveness of such (e. g. three) divorces, or the effectiveness of one divorce only, cannot be finally determined.

Now, considering those traditions on which the verdict of the effectiveness of three divorces as one revocable divorce only is based are of the kind about which the traditionists and the jurists have formed the view that they provide no cogent argument on the point at issue, viz. whether on the pronouncement of three divorces at a time only one divorce shall take effect.

Tradition relating to Ibn 'Umar : The first tradition that Ibn 'Umar pronounced three divorces to his wife during her menstruation, is narrated by Dār Quṭnī. Qurtubī in his famous commentary on the Holy Qur'ān writes that Dār Quṭnī himself has said about this tradition that all the narrators of its chain of authority are Shi'ah.⁶⁹ In fact the authentic

⁶⁶Ibn Hazm : *Al-Muḥallā*, Cairo, 1352 A.H., vol. 10, pp. 169-73.

version of the tradition is that wherein the pronouncement of *one revocable* divorce by Ibn 'Umar to his wife during her menstruation is narrated⁷⁰ and to which all the *a'imma*h and traditionists conform.

Rukana's Tradition : The second tradition relied upon by the second school of thought is that of Rukana. Al-Qurtubi has said about this tradition that the same being *muḍṭarab* (conflicting in text and chain of narrators) and *munqaṭi'* (with a break in the chain of narrators) is not fit to be advanced as an argument in as much as Abū Da'ūd reported it from Ibn Jurayj who did so through some people of Banū Abī Rāfi' and none of the latter could possibly learn it from 'Ikramah who reported it from Ibn 'Abbas. The gist of this report referred to above is that Rukana had pronounced three divorces to his wife and the Prophet had told him to have recourse to her. But the same tradition with several other chains of authorities has been reported from Nafi' Ibn 'Ujayr to the effect that Rukana Ibn 'Abd Yazīd had pronounced *battah* (breaking off, cutting off) divorce to his wife i.e. he had used the word "*battah*" instead of the word "*thalōtha*". The Prophet thereupon had put him on oath as to what he meant by the word "*battah*". Rukana had stated on oath that he meant (by that word) only one divorce. Thereupon, the Prophet had made the wife return to him. The conclusion is that he had pronounced divorce by the word "*battah*" and not by the word "*thalōtha*" (three). As pronouncing divorce by the word "*battah*" is allusory, the intention of the person pronouncing it shall be relied upon. Hence, the tradition cannot be advanced as proof of the pronouncement of three divorces at a time. Al-Jaṣṣāṣ (d. 370 A.H.) as well has stated in his noted commentary on the Holy Qur'ān that some people hold this tradition of Rukāna to be unacceptable. Consequently, the tradition is not fit to be advanced as an argument. Moreover, the version mentions the use of an imprecise word viz. "*battah*" by Rukana whereupon the Prophet put him on oath to explain the intention behind the allusion to divorce and gave his verdict accordingly. This also is the proof of the fact that if Rukana intended three divorces, the three of them would have taken effect. Had there been no doubt with respect to three divorces there would not have been the necessity of putting him on oath.

Ibn al-Qayyim on Ḥadīth of Rukāna : Hāfiz Ibn al-Qayyim has elaborately discussed this matter in his noted book, "*Zād al-Ma'ād*" and in answer to the several objections to the tradition narrated with respect to Rukana, has particularly referred to the version narrated by Nafi' Ibn 'Ujayr.

He argues that it is strange that an unknown narrator like Nafi' Ibn 'Ujayr is being given preference over Ibn Jurayj and others inspite of the fact that al-Bukhārī is convinced of this tradition being *Muḍṭarab* (conflicting in text and narrators). Tirmizi too holds the tradition in which the

word "*battah*" occurs to be Muḍṭarab (def. *Supra*). "In some chain of authority this tradition is reported with the words, "He divorced her thrice", and in some other chain with the words "He divorced her one (divorce)" and in still others with the words "he divorced her with the word "*battah*" (breaking off). Imam Ibu Hazm as well has called all these versions to be weak and that the tradition narrated by Nafi' can be given no preference over that narrated by Ibn Jurayj through some people of Banu Rāfi'. True that "some of Bānu Rāfi' may be *majhūl* yet they were undoubtedly successors of the companions of the Prophet and none of whom has ever been charged with telling lies. Besides, the version of Ibn Jurayj has come through such reliable authorities that it is hard to disbelieve it.

Comments on Ibn al-Qayyim : Hāfiẓ Ibn al-Qayyim's remarks about Rukana's ḥadīth can be easily controverted. For one thing the report has several versions. Dār Quṭnī has referred to the tradition from Nāfi' Ibn 'Ujayr on three chains of authority relied on by al-Shāfi'ī. The word, *battah*, (breaking off) is there in the tradition with the detail that thereafter Rukana had pronounced second divorce in 'Umar's time and the third divorce in Uthman's time. The second comes to Dār Quṭnī through four chains of authority from 'Abdullah b. 'Ali b. Yazid b. Rukana. In this version, it is stated that the divorce was pronounced with the word, *battah*, (breaking off). Besides, Dār Quṭnī, has appraised the version reported to al-Shafi'ī, and said, "The tradition is correct", (ṣaḥīḥ). Thereafter, he merely mentions the version of Abdullah b. Ali b. Yazid, the grandson of Rukana but has made no comment on the narratives. Abū Da'ūd after recording the traditions of Nāfi' Ibn 'Ujayr and Abdullah b. Ali b. Yazid b. Rukana has said, "The versions are more correct as both Nafi' and Abdullah are grandsons of Rukana and one belonging to the family is more aware of the matters than others. True, Abū Da'ūd has stated from Ibn 'Abbās the tradition of Rukana on the authority of Ibn Jurayj through some of the progeny of Abu Rāfi' through 'Ikramah, in which the words of "divorced her three" and "divorced her thrice", do occur. But in fact the statement regarding the version of the tradition concerning Rukana with the word *thalātha* is Muḍṭarab (conflicting) appears to be correct. Hāfiẓ Ibn al-Qayyim himself admits this conflict and so no argument can be based on it. Thus, clearly the tradition of Rukana, in which the pronouncement of divorce with the word, "*battah*" (breaking off) is reported on the strength of the chain of authority set forth above, should be accepted as correct.

There is another reason to prefer this version consisting of the word "*battah*", breaking off. The Traditions which speak of the pronouncements of three divorces by Rukana are all narrated by 'Ikramah from Ibn Abbas.

Abu Da'ūd after recording the traditions of Ibn 'Abbās, Nāfi' b. 'Ujayr and 'Abdullah b. 'Ali b. Yazid, has come to the conclusion that the reports through Nāfi' b. 'Ujayr and 'Abdullah b. 'Ali b. Yazid, who are the descendants of Rukana, are more reliable than those traditions that are stated through 'Ikramah. Ibn 'Abbās⁶⁷. Bayhaqī as well after discussing all these traditions has concluded that the chain of authority concerning the pronouncement of divorce with the word "three" by Rukana cannot serve as good authority. There are, he says, eight such narrators who have stated from Ibn 'Abbās his own opinion about the effectiveness of the pronouncement of three divorces, as against this tradition of Rukana, in which he (Ibn 'Abbās) supports the third school of thought.⁶⁸ Besides, 'Ikramah, a slave freed by Ibn 'Abbās, has narrated the tradition regarding Rukana from Ibn 'Abbās in such a manner that on reading the same it looks as if Ibn 'Abbās himself was not then present. Had Ibn 'Abbās himself been present at that time, he must have narrated the event in words that would have left little doubt about his presence on the occasion.

Ibn Qayyim calls Nāfi' Ibn 'Ujayr a person of unknown antecedents although Abū Dā'ūd in his "Sunan" giving his name and parentage clearly traces him as Nāfi' b. 'Ujayr b. 'Abd Yazīd b. Rukāna. This identifies Nāfi' b. 'Ujāyr as belonging to the family of Rukāna just as 'Abdullah b. 'Ali b. Yazīd b. Rukāna belongs to his family. According to Ibn Qayyim if some of Banū Rāfi' on account of being from amongst the successors of the companions of the Prophet, inspite of being unidentifiable but not apt to say the untruth, can be credited as the narrator of the traditions, similarly Nāfi' b. 'Ujayr is from amongst the successors of the companions of the Prophet and is not apt to say the untruth. Hence his version of tradition, compared to that of some persons from Banū Rāfi' shall be more reliable. The tradition with his chain of authority, as he is of the family of Rukāna, shall get preference. On similar grounds Abū Dā'ūd calls the tradition narrated with the chain of authority of Nāfi' b. 'Ujayr and 'Abdullah Ibn 'Ali b. Yazīd b. Rukāna more reliable than the version given by Ibn Jurayj reporting through "some" of Banū Rāfi'.

Hāfiz Ibn Qayyim characterises this tradition to be muḍtarab^{68a} and has in this connection quoted Imam Bukhārī as well. Imam Bukhārī, however, tends to show *iqṭirāb* in this tradition because of Nāfi' Ibn 'Ujayr, for in all the chains of narrators traced upto him the pronouncement of divorce is reported with the word "*battah*" (breaking off). In no narrative of Nāfi' the pronouncement of divorce is mentioned with the word "*thalathah*"

⁶⁷Abū Dā'ūd ; *Al-Sunan*, Kanpur, pp. 299-301.

⁶⁸Bayhaqī : *Al-Sunan*, Dacca; 1353 A.H., vol. vii, p. 339.

^{68a}Tradition having *iqṭirab* (conflict) in text or narrators.

(three). The same is the case of 'Abdullah b. 'Ali b. Yazīd b. Rukāna. Therein also the pronouncement of divorce by Rukāna to his wife is reported with the word "*lattah*". In fact the *idtirāb* arises when the tradition regarding Rukāna with the word "*thalathah*" (three) in the narrative of Ibn Jurayj is compared with the version of Nāfi' b. 'Ujayr and 'Abdullah b. 'Ali wherein there is the word "*battah*" (breaking off). Hence the *idtirāb* arises due to the narrative of Ibn Jurayj and not otherwise.

Conclusion :

In the light of the above discussion, we arrive at the conclusion that the tradition narrated by 'Ikramah cannot form the basis of the argument for holding the pronouncements of three divorces at a time as the pronouncement of one revocable divorce. Rather, this very tradition of 'Ikramah, if closely examined, discloses that it is the basis of the argument of holding the pronouncement of three divorces at a time as the pronouncement of three divorces because the wording of the last part of the tradition is :

"The Prophet, peace be on him, then said, "you do have recourse to your wife 'Umm Rukāna". Rukana said, "O' Prophet of God, I have pronounced three divorces to her". The Prophet said, "Yes ! I know, have recourse to her."

The statement of Rukāna to the Prophet that he had pronounced three divorces (how then could he have recourse to his wife) proves the fact that Rukāna knew that by the pronouncement of three divorces at a time the wife becomes unlawful and the husband could have no recourse to her. And such thought must have occurred to Rukāna only if prior to his own case he knew of some such past event. It also stands proved from this fact that Rukāna considered the pronouncement of divorce with the word "*battah*" breaking off (as has been narrated by Nāfi' Ibn 'Ujayr and 'Abdullah b. 'Ali b. Yazīd) as an heterodox irrevocable divorce. To him there was no difference in the use of the two words "*talāq al-thalathah*" three divorces" or "*talaq al-battah*". As the Prophet knew that the divorce had been pronounced with the word "*al-battah*", just to clear up the matter he said, "I know" (the word with which you have pronounced the divorce is capable of having more than one meaning i.e. it may mean "three divorces" as well as "one divorce)", "you do have recourse to her" (as you intended only one divorce).

Hence, it may with confidence be said that the factual case is as has been stated by Nāfi' b. 'Ujayr and 'Abdullah b. 'Ali b. Yazīd. Other narrators have, apparently due to ambiguity of the word "*battah*" interpreted

it according to their own lights. But the over all conflict in narrative is due to their own narration. On account of this, however, the authenticity of Nāfi' b. 'Ujayr and 'Abdullah b. Ali b. Yazīd cannot be held to have been impaired.

Besides, the texts (the actual words of expression of the two traditions of 'Ikramah regarding Rukāna which have been reported by "some of Banū Rāfi'" as well as that by Da'ūd Ibn al-Ḥaṣīn) deserve consideration because of their contradictory narratives. The version reported by 'Ikramah from Ibn 'Abbās which has been stated by some of Banū Rāfi' and which has been recorded by Abū Da'ūd and Bayhaqi in their *sunan*, says in effect : "Rukāna after pronouncing divorce to 'Umm Rukāna married a woman of Muzniyah tribe. This woman came to the Prophet alleging that Rukāna was impotent. The Prophet then directed Rukāna to divorce the woman and have recourse to 'Umm Rukāna".

As against this tradition, it is stated in the version of Da'ūd Ibn al-Ḥaṣīn, that after the pronouncement of divorce to his wife Rukāna in great distress came before the Prophet for advice. Whereas, in the narrative of "some of Banu Rafi'" it is said that when the Prophet asked him to have recourse to his wife, Abū Rukāna being much agitated tried to avoid it by saying "O' Prophet of God ! I have pronounced three divorces, how can I have recourse to her ?" (From this talk of Rukāna contrary to Da'ūd's version it does not appear that he had the wish of having recourse to his wife). It is also positively stated in the narrative of Da'ūd Ibn al-Ḥaṣīn that Rukāna after pronouncing the divorce was in great grief.

The second contradiction is that in the narrative of "some of Banū Rāfi'" it is recorded that when Rukāna informed the Prophet of his pronouncing the divorce, the Prophet said, "I know of it". Whereas, it is stated in the narrative of Abu Da'ūd b. al-Ḥaṣīn that the Prophet asked Rukāna about the mode of divorce, "How did you effect the divorce?" It shows that the Prophet did not know the mode of divorce.

Thirdly, in the narrative of "some of Banū Rāfi'" only the pronouncement of three divorces is mentioned. The fact that three divorces were pronounced at a time is not specifically mentioned. Whereas it is stated in the narrative of Da'ūd b. al-Ḥaṣīn that the Prophet had also asked about the three divorces being pronounced at a time and that Rukāna replied, "Yes, (I had pronounced three divorces in one sitting)". From this it is clear that the Prophet had no knowledge as to how and in what manner Rukāna had pronounced the divorce.

In both these narratives the facts stated are at variance with each other. It should also be taken into account, whether a jurist and a highly learned

man like Ibn ‘Abbās can make such self-contradictory and inconsistent statements in describing one and the same matter ? The truth appears to be that the expressions used are that of Ikramah himself which he presented according to his own lights in different ways. It is also the opinion of the traditionist Abū Da‘ūd reported through Ismā‘il b. Ibrāhīm b. Ayūb that it is the statement of Ikramah.⁶⁹

Tradition narrated by Ta‘us :

Those who are convinced of the effectiveness of one revocable divorce in the event of the pronouncement of three divorces at a time also support their view by quoting the tradition regarding Abū al-Ṣahbā narrated by Ṭā‘ūs, which has been reported by Abū Da‘ūd with two chains of authorities,⁷⁰ and by Dār Quṭnī with five chains of authorities.⁷¹ Imām Muslim has also narrated the tradition with three chains of authorities,⁷² and Imam Bayhaqī as well on his own chains of authorities. (The tradition as narrated by Muslim has been fully stated at pages 424, 425 footnote 51, *supra*).

If this tradition is studied thoroughly it can very easily be concluded that it is not a *ḥadīth* from the Prophet, in as much as in none of these narratives from any chain of authority, any saying or act of the Prophet or that of Abū Bakr or of ‘Umar has been reported in support of the view of Ibn ‘Abbās holding the pronouncement of three divorces at a time as one divorce. Nor it seems that Abū al-Ṣahbā had put the question to Ibn ‘Abbās by quoting it in support of some incident of the period of the Prophet or of that of Abu Bakr and ‘Umar. Rather, the statement of Abu al-Ṣahbā in all the chains of authority is vague. The fact appears to be that Abū al-Ṣahbā knew no such event. If he knew he must have spoken of it to Ibn ‘Abbās. Moreover, the tradition is *Muḍṭarab*, having contradiction in the narrators and texts of the tradition. Al-Jassās and Ibn Humām call the tradition as *Munkar* (repudiated). The author of *Istizkār* holds the tradition as wrong and based on whim.

Opinion of Al-Jaṣṣāṣ : Al-Jaṣṣāṣ has discussed this tradition of Abū al-Ṣahbā in his famous work “*Aḥkām al-Qur‘ān*” that this tradition and the tradition concerning Rukana are *munkar* (to be repudiated). This should be so because Sa‘īd b. Jubayr, Mālik Ibn Ḥuwayrith, Muḥammad b. Ayās and Nu‘mān b. Abi ‘Ayāsh have authoritatively reported from Ibn Abbas his

⁶⁹Abū Da‘ūd : *Sunan*, Kanpur, vol. i, p. 229.

⁷⁰Ibid.

⁷¹Dar Quṭnī : *Sunan*, Delhi, vol. ii, pp. 440-45.

⁷²Muslim : *Ṣaḥīḥ* (with Commentary by Nawawī) Cairo, 1324 A.H., vol. x, pp. 70-72.

verdict of three divorces taking effect duly as three. Al-Jaṣṣāṣ, proceeding further, writes that at best the meaning that can be attached to this tradition is that the people during the period of 'Umar had started pronouncing three divorces; hence Caliph 'Umar made them effective.⁷³

Point of view of Qurtubī : Qurtubī in answer to the narrative of Abu al-Ṣahbā has said that Sa'īd Ibn Jubayr, Mujahid, 'Aṭā, 'Amru Ibn Dinar, Malik Ibn Ḥuwayrith and Nu'man b. Abi 'Ayash have invariably reported from Ibn 'Abbās, about the person who pronounces three divorces at a time that "his wife becomes irrevocably divorced by him. He, thereafter, cannot remarry her till she does marry another person and obtain divorce from him." The words of these *a'immaḥ* support the statement that Ibn 'Abbas was convinced of "three divorces taking effect at once." This makes evident the weakness of the contrary narratives of Ṭā'ūs and others. It seems impossible of Ibn 'Abbās to give vent to his personal opinion as opposed to the views of all the other companions of the Prophet.

Qurtubi reports that Ibn 'Abd al-Bir has characterised the narrative of Ta'ūs as whimsical and wrong. The jurists of Hijāz, Syria, Iraq and others have attached no importance to this tradition. Qurtubi writes that the fact of Abu al-Ṣahbā being a Mawla (a freed slave) of Ibn 'Abbās, too, is uncertain.

Qurtubi speaking of the assertion of 'Umar, writes : 'Umar said, "The matter in which the people had the opportunity of exercising due deliberation, they have, therein, started to make haste. Hence it would be better if we give effect to it as such". And thus 'Umar made the pronouncement of three divorces effective. This at best means that during the period of the Prophet, Abū Bakr and the two early years of the Caliphate of 'Umar, people did not pronounce three divorce at a time, rather they contented themselves with the pronouncement of one divorce only. There are several narratives from Ibn Abbas that he gave the verdict of all the three divorces duly taking effect if a person pronounced three divorces at a time. If the narrative of Ibn 'Abbās as reported by Ibn Ta'ūs from his father Ta'ūs is taken to mean that the pronouncement of three divorces at a time takes effect as one divorce, the fact remains that Ibn 'Abbās adopted the unanimous view of the companions of the Prophet resiling from his previous opinion. This is the only inference because of his latter verdicts. Thus the pronouncement of three divorces at a time taking due effect shall be established by the consensus of opinion of the companions of the Prophet including that of Ibn 'Abbās.⁷⁴

⁷³Al-Jaṣṣāṣ (d. 370 A.H.) : *Aḥkām al-Qur'ān*, Cairo, vol. i, p. 388.

⁷⁴Qurtubi : *Jamī'al Ahkām al-Qur'an*, Cairo, vol. iv, p. 129.

Qurtubī, in support of this view has also advanced another argument on the basis of *Qiyās* (analogical deduction) : that it is the husband who is entitled in *Shari'ah* to pronounce three divorces. It is his option to pronounce them separately or he may pronounce them collectively. Qurtubī has also recorded that al-Kiyā al-Ṭabṛī, quoting reputed traditionists, has remarked that the people of that period used to pronounce one divorce, the people of these days are used to pronounce three divorces (i.e. people previously pronounced only one divorce during the entire term of probation). Qāḍī Muḥammad 'Abdul Wahāb says, "The meaning of the narrative of Ṭā'ūs is no more than that during the times of the "Prophet" and the first two Caliphs people used to pronounce only one divorce; thereafter, during the period of 'Umar, people adopted the method of pronouncing three divorces."

Opinion of Ibn Hazm : Abū Muḥammad Ibn Ḥazm has said in his famous work, "*Al-Muḥallā*" that the words of one of the narratives of Ibn 'Abbās reported by Ṭā'ūs are "Three divorces were one". In another narrative the words are "Three were turned back towards one divorce". In yet another narrative the words are,....."Three divorces were made into one divorce". It is not mentioned in any of these narratives that the Prophet himself held them to be one divorce or turned them into one divorce; neither it is mentioned in these narratives that the Prophet, when coming to know about the same, accepted the fact of three divorces as one. Only that tradition can be accepted as conclusive which directly bears upon any saying or fact that has been said by or acted upon by the Prophet himself or which having come to his knowledge has been approved of and not repudiated by him. Thus, in our view, Ibn Hazm writes, it shall not be correct to argue the effectiveness of three divorces as one divorce on the basis of such traditions. We are not convinced of their authority.

At the conclusion, Ibn Hazm having surveyed the whole set of narratives that denote the due effectiveness of the pronouncement of three divorces has written, "For a just minded person these traditions from the companions are enough to prove the effectiveness of the pronouncement of three divorces".⁷⁵

Argument of Ibn Qudāmah al-Maqḍīsī : Ibn Qudāmah al-Maqḍīsī discussed in his book, *Al-Mughnī* that some of the 'Ulamā' have written that the meaning of the tradition narrated by Ṭā'ūs from Ibn 'Abbās, is to the effect that during the period of the Prophet, of Abū Bakr and of the early period of 'Umar it was not the practice to pronounce (three) collective divorces as had later become prevalent. Rather at that time only one

⁷⁵Ibn Hazm : *Al-Muḥallā*, Cairo, 1352 A.H., vol. x, pp. 167-72.

divorce was pronounced. If this be not the meaning of the tradition how could it be possible that 'Umar would give a verdict contrary to the view that was in vogue from the time of the Prophet and that of Abū Bakr. Neither could it be valid for Ibn 'Abbās to give verdict contrary to the tradition of the Prophet earlier narrated by him.⁷⁶

Point of view of al-Bayhaqī : Al-Bayhaqī (d. 457 A.H.,) has, after recording in his book "*Al-Sunan al-Kubrā*" almost all the relevant traditions of the Prophet and his companions, said that Ibn 'Abbās probably had come to know of the repeal of the commandment concerning three divorces being treated as one. It is on this account that he gave final verdict against the narrative of Ṭā'ūs. If it were not so, Ibn 'Abbās could not dare give verdict against a tradition from the Prophet after reporting it himself.⁷⁷

Hafiz Ibn Qayyim's Rebuttal :

Hafiz Ibn Qayyim in his famous works "*Zād al-Ma'ād*" and "*Ighathatul Lahfān*"⁷⁸ supporting the effectiveness of only one revocable divorce, in case of the pronouncement of three divorces at a time, has elaborately discussed the subject. He writes :—

1. Re-marriage prohibition in case of pronouncement of three divorces in itself is the proof of the fact that pronouncement of three divorces at a time should not take effect.

2. (a) Hāfiẓ Ibn Qayyim in support of the view that divorces ought to be pronounced one after the other, and in case the three divorces are pronounced at a time they shall take effect as one revocable divorce, mentions the instance of what God says concerning *Li'ān*: "And for those who launch a charge against their spouses and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by Allāh that they are solemnly telling the truth. And the fifth (oath) (should be) that they solemnly invoke the curse of Allāh on themselves if they tell lie" (xxiv: 6,7). In these verses, "husband and wife each swear in the name of Allah four times", i. e. swear four times one after the other. Hence, if some one says once that he bears witness swearing four times in the name of Allah, it shall be treated as one oath. Consequently where the repetitions of oath, admission, or evidence are incumbent (as prescribed) no religious mandate

⁷⁶Ibn Qudāmah : *Al-Mughnī*, Cairo, 1367 A.H., voi. vii, p. 105.

⁷⁷Al Bayhaqī : *Al-Sunan al-kubra*, Hyderabad Deccan, 1353 A.H., vol. vii, p. 338.

⁷⁸Ibn al-Qayyim (d. 751 A.H.,) : *Zad al-Ma'ād*, Cairo, 1324 A.H., vol. ii, pp. 255-64; *Ighathatul Lahfān*, Cairo, vol. i, p. 335.

shall become operative without the repetition of that oath, admission, or evidence.

(b) Ibn al-Qayyim, in support of his stand, cites the incident generally known as the incident of *Qasamat*, which relates to the swearing by fifty persons of the locality for their man having been murdered. Ibn Qayyim, quoting the incident of *Qasāmat* (oath), writes that the Prophet said, "Swear fifty oath and become entitled to your companion's blood money". If any one of those people whose man had been murdered says (in one sentence) that he swears fifty oaths in the name of God that such and such person has assassinated their man, the swearing of the oaths shall amount to one oath.

(c) Ibn Qayyim further writes, "similar is the case with the admission of adultery", i.e. if the adulterer says *once* that he admits *four times* that he has committed adultery it shall amount to one admission. Ibn Qayyim, proceeding further, argues, "If it is said that a certain person has done (something) thrice or has said (something) thrice it means that he has done it thrice separately or has said it thrice separately. For instance, if it is said, "I have abused thrice or have saluted thrice", it would mean saying them or doing them thrice separately."

(d) Ibn Qayyim taking another line of argument against the effectiveness of the pronouncement of three divorces at a time says that the assertion of the Sunnis to the effect that the Holy Qur'ān proves the propriety of pronouncing collective divorces, is unacceptable. So far as the Qur'anic verses (ii : 228, 231) are concerned it can, at best, be argued that they prescribe no details nor conditions. (That it to say, in these verses God has not given the details of how the collective or separate divorces are pronounced. How then are we entitled to make distinctions in that wherein God does not ?). The answer according to Ibn Qayyim is that the bare words of these verses do not provide any clue to indicate that these verses cover the pronouncement of both types of divorces (and so in effect condone or permit pronouncement of three divorces effective at a time). Similarly, the pronouncement of divorce to a woman in her menses or the pronouncement of divorce to a woman in that period of her purity in which sexual intercourse has taken place is not covered by these verses. It is absolutely clear that the effectiveness of all such divorces which are pronounced by people, in whatever manner they like, cannot be deduced from the said verses of the Holy Qur'ān. Allāh has laid down in the Holy Qur'an the rules governing the divorces that are forbidden or lawful for us. Hence, Ibn Qayyim argues, "We in the Holy Qur'ān find only one case of irrevocable divorce and it is when the husband completes

the pronouncement of three divorces to his wife with whom sex relations have taken place (or where divorce is effected by way of *Khul'a* at the instance of wife by the husband for consideration).

Ibn Qayyim has also criticised the different traditions that are cited in support of the effectiveness of the pronouncement of three divorces. He then forcefully refutes the objections raised against the traditions narrated through *Abū al-Ṣahbā*. He adds that all the arguments adopted in refutation of this tradition have failed.

3. As for the objection that the latter verdicts of Ibn 'Abbās are against the tradition of *Abū al-Ṣahbā*, Ibn al-Qayyim says, "This divergence of his verdicts shall have no force and the tradition shall hold good because any verdict or statement of Ibn 'Abbās as compared to a tradition is of no value."

4. As for the objection that Ibn 'Abbās must have known of the abrogation of his narrative (tradition narrated by *Ṭā'ūs*) on the basis of which he gave his latter verdicts Ibn Qayyim aptly poses the question "Where is the abrogating narrative?"

5. He also meets the objection that the meaning of the narrative (of *Abū al-Ṣahbā*) is not that which is apparently being understood, rather it means simply that during the time of the Holy Prophet and in the period of *Abū Bakr*, people used to pronounce only one divorce, and they adopted the method of pronouncing three divorces in the period of 'Umar. Ibn Qayyim argues, "To accept this meaning of the tradition would be altering its words and giving a changed meaning as the people had all along been pronouncing one as well as three divorces. Further, to interpret this tradition to mean that people by saying "you are divorced, you are divorced, you are divorced" meant only to lay emphasis by these last two utterances on the first utterance of divorce and so it was taken to indicate (intention of) one divorce is, according to Ibn al-Qayyim, "too far-fetched because the words of the tradition from the beginning to the end are incapable of bearing out that meaning".

6. The next objection is that there is no mention in the tradition regarding *Abū al-Ṣahbā* that the Holy Prophet himself held the three divorces as one (and so three should be effective) or that if the same was brought to his knowledge he maintained it. Ibn Qayyim's answer to that is that it is a big calumny (on the Holy Prophet). It is not at all possible that a matter introducing changes in the dictates of God be continuously operative (i. e. a woman who is forbidden if three divorces were effective is continuously treated as lawful to one) and the Prophet himself, remained

ignorant about it even though he was open to be informed by the process of revelation.” Ibn Qayyim means to say that the Prophet kept silent indicates that he accepted it as one divorce, otherwise warned by revelation he would not have kept silent condoning a forbidden relationship.

7. In connection with the argument, “When traditions happen to be conflicting, assertions of the companions of the Prophet are given due consideration”, Ibn al-Qayyim writes thus: “At the time of death of the Prophet there were nearly a lac of his companions who had associated with him, had seen him and had listened to his words. Of all these companions there is not the one-tenth, twentieth or even fortieth number that has held the pronouncement of three divorces at a time effective as three (heterodox) divorces”. Ibn al-Qayyim proceeds, “Even if the persons in favour try their best they would not be able to prove that out of these companions even twenty of them agree (on the point of due effectiveness of all the pronouncement of three divorces).

8. Hāfiẓ Ibn al-Qayyim advances one more argument in favour of his view that the three divorces constitute only one. He maintains, if we go by the number of those companions of the Prophet who were in favour of holding the pronouncement of three divorces as one, it shall be twice as much as of those who were in favour of holding the pronouncement of three divorces at a time effective as three. He then proceeds, “It will certainly be true to say that the personality of Abū Bakr (God be pleased with him) was superior to the rest of the companions of the Prophet. Among the companions of the Prophet who were there in his (Abū Bakr’s) time there was an *’ijma* (consensus) over the question and none of them had then disagreed on the point of taking effect of not more than one divorce. It was after him that disagreement arose. The first consensus of opinion reached in Abū Bakr’s era could not endure and two different views of the Holy Prophet in this respect came into vogue. Since then the disagreement continues till this day”.

9. Ibn al-Qayyim in reply to the argument that it was ‘Umar who held the pronouncement of three divorces effective remarks, “Umar had not adopted the principle of enforcing the effectiveness of the pronouncement of three divorces in opposition to the *’ijmā* of the preceding companions of the Prophet. Rather he had made the pronouncement of three divorce effective in order to punish those who pronounced the three divorces because they, knowing the act to be unlawful, continued adopting the method of pronouncing three divorces at a time. That is to say, this injunction by ‘Umar was a disciplinary measure in the interest of the Muslim community. It was in keeping with the rules of *Shari’ah* when people

start going beyond the limits prescribed by God wherein they have been asked to stay. He further restricts them and the path of the God-fearing is not kept open for them. Hence it is within the power of the Imam of the Muslim community to subject to such hardship and restrictions those who voluntarily adopt the same for themselves”.

Refutation of Ibn al-Qayyim :

1. Hāfiẓ Ibn al-Qayyim's first argument in support of his view is based on *Qiyās* that the collective pronouncement of three divorces is forbidden (not having been mentioned in the Qur'ān) and an innovation, and every innovation being against the bidding of the Prophet should be rejected. Hence the pronouncement of three divorces collectively must not take effect at all. Apparently there is a contradiction in this view of his and his final conclusion of the argument viz. that only one divorce takes effect in a collective triple divorce. It is, therefore, evident that Ibn al-Qayyim has in his mind traditions of Rukāna and Ta'us on the basis of which he argues the effectiveness of one divorce only. Thus the basis of the argument changes from *Qiyas* to Tradition. The said two traditions, however, have already been elaborately discussed in the foregoing pages that they (traditions of Rukāna and Tā'ūs) do not prove the effectiveness of one divorce only.

2. Ibn al-Qayyim has, in support of his view, cited Qur'ānic verse, “A divorce is only permissible twice (ii : 228) in proof of the non-effectiveness of three divorces pronounced at a time. By quoting this verse Ibn Qayyim intends to draw support for his argument on the analogy of three postulates viz. the prescribed amount of evidence for *Li'ān* (imprecation), *Zinā* (adultery) and *Qasāmat* (oath). In all these cases the evidence consists of repeating a formula several times on oath in proof of *one fact*. (So three divorces at a times mean no more than one divorce). But the answer to this argument is as follows : If a certain expression or phrase is not meant to convey mere information but is intended to give effect to something it certainly creates something or some effect where there was none. Further if it is intended to qualify this something or effect, adjectives indicating quality, condition, colour or number are added to it. The resultant expression will then create the intended thing or effect so qualified. Another fact of life is that a person can do a thing once and quite as easily do it more than once at intervals. He can also create a collection of things or produce a number of effects by a single word or act at the same time. For example, he can give a rupee to X, three times at intervals but he is equally capable of giving X three rupees at once. In the first case the act is one but the objects are three. It cannot be argued that as the act of giving was one, the thing given should necessarily be one. The husband

is entitled to pronounce three divorces. He may by his acting thus bring them from non-existence into existence separately at different times. Similarly he may bring into existence the two or three of them collectively at a time. Just as the man who possesses three rupees is entitled to give these rupees to another person one by one separately at different times or all the three collectively at a time. The only difference would be that, in the first instance, the amount of rupees and the acts of giving both shall be three whereas, in the second instance the amount of rupees shall be three but the act of giving shall be one. It is not possible to say that merely by the act of giving three rupees at a time the amount shall be reduced to one. The amount shall remain the same whether it is given at a time or at different times. Thus if a person says, "you are divorced" one divorce shall take effect; if he says, "you are twice divorced" two divorces shall take effect; and if he says, "you are thrice divorced" three divorces shall take effect.

(b) There is, in this respect, another example. A person, after having made another person the owner of three rupees, says, "you may give away these three rupees to a needy person but it shall be better if you give away these three rupees one by one at three different times. That another person, however, gave away all the said three rupees at one time to a needy person. Will it, then, be said that he gave away one rupee only? It is obvious that he gave away three rupees. Indeed he acted against the way approved by the first man; but his so acting makes no difference to the effect of giving away of the rupees or to the effect of receiving of the rupees or in the amount of the rupees.

(c) Keeping these examples in mind if the verse, "A divorce is only permissible twice" (ii : 228) is considered, the fact shall emerge that God, bestowing upon the man the authority of pronouncing three divorces, has given directions as to how make best use of the right of the pronouncement of the three divorces. It cannot be inferred from this verse that man's using his right of pronouncing the number of divorces contrary to the better method shall not bring the intended divorce into existence from its non-existence or that only one divorce shall come into existence. Although effecting three divorces together is against the approved method but it cannot stand in the way of divorce being effective.

3. (a) The argument of Ibn al-Qayyim that the verdict given by Ibn 'Abbās contrary to a *ḥadīth* shall be rejected, on the principle that "a companion of the Prophet is not immaculate" is not correct. The principle referred to is not such a fundamental rule that it shall apply to every event and in every case. According to all the traditionists, it is a settled rule that the positive enunciation of a companion of the Prophet relating to

legal matters is presumed to be one that could not have reached him from any source other than the Prophet and even though the companion had not ascribed the assertion specifically to the Prophet, it shall be deemed to be the assertion of the Prophet. As the matter is of such gravity, viz. the wife's being made lawful or unlawful to husband, a power that belongs to no one except the Prophet (peace be on him), it is obvious that Ibn 'Abbās would not deviate from the law.

(b) The principle stated by al-Qayyim shall be applicable when a narrator is alone in having his view against what he himself narrates from the Prophet or when he is supported by only a few people. But when his views and verdicts (though against his report) get support from all the jurists companions (of the Prophet) the narrative shall be held to be obsolete. This will be so because the practice of the generality of the companions against the narrative proves that in their view the narrative was weak or not worthy of being taken as proved. Whereas the other interpretation was the real meaning of the narrative as became evident from the manner the companions continued the practice.

4. The fourth objection of Ḥāfiẓ Ibn al-Qayyim is that the *ḥadīth* which is stated to have abrogated the narrative of Ta'ūs, is not available. This is not quite correct. Undoubtedly there is no direct tradition in our knowledge which abrogates the narrative of Ṭā'ūs. As against it, however, the traditions relating to 'Uwaymir and Ibn 'Umar (with more reports) may be cited. Indeed it cannot be denied that the tradition (of Ṭā'ūs) is not based on any specific event; rather it presumes the existence of some such event or events that were supposed to have been known to Ibn 'Abbās. Is it not possible that the un-stated event on the basis of which the support of Ibn 'Abbās is being sought may not have been correctly reported to Ibn 'Abbās. Or that the information of narrative, subsequent to its narration by Ṭā'ūs, may have reached Ibn 'Abbās in some other form on the basis of which he may have given the verdict of taking effect of all three divorces on such pronouncement. It is to be noted that Ibn 'Abbās held the pronouncement of three divorces effective as three divorces at the time when Ṭā'ūs was still alive. It is just possible that the tradition regarding Rukāna may have first reached Ibn 'Abbās with the word, "*thalātha*", three, and later on he may have learnt that Rukāna had pronounced the divorce with the word "*battah*", breaking off. That is why, Ibn 'Abbās himself did not speak of his personal presence or audience at the time of the events of the tradition regarding Rukāna, which has been narrated by 'Ikrama from Ibn 'Abbās. (It should also be noted that the age of Ibn 'Abbās at the time of the death of the Prophet is stated to be about thirteen years).

5. (a) One cannot agree with the argument of Ḥāfiẓ Ibn al-Qayyim that the tradition (ascribed to Abu al-Ṣahbā) cannot be taken to mean that during the period of the Prophet, of Abū Bakr and during the early period of caliph ‘Umar people pronounced only one divorce; thereafter they started pronouncing three divorces at a time. (For further discussion see “Conclusion” *infra*).

(b) After careful consideration of the traditions stated above the one conclusion that may be drawn is that the narrative of Abū al-Ṣahbā should be interpreted in a manner that there may not arise any contradiction between this tradition and the consensus of the companions of the Prophet. Hence is relevant the report of Razīn to the effect that the tradition indicates that in the early period, the utterance of the words, “You are divorced, you are divorced, you are divorced” (thrice) by a person was held to be the pronouncement of one divorce only, emphasised by the last two repetitions of the words, “You are divorced” and no more. As the people of the period had intentions pure and their hearts were inspired with belief, their words and intentions were received as true. This state of affairs did not continue in the period of ‘Umar. People began to consider that every word of divorce meant an independent divorce. Hence ‘Umar, in the light of their words and intentions, made the pronouncement of three divorces effective. This explanation gets support from the tradition reported by Ibn Mas‘ūd. The statement of Ibn al-Qayyim that the words of Abū al-Ṣahbā’s tradition do not support such an interpretation (as his opponents suggest) may be correct. But except this there is no other way reconciling Abu al-Ṣahbā’s narrative with the subsequent accepted practice. Further, this tradition by itself refers to no specific happening or event, rather it states with no reference an event or a practice that was in vogue. We have, therefore, to analyse the tradition historically. After its historical analysis the interpretation found more approximate and appropriate to the ultimate practice prevalent at the time shall be considered to be the correct and appropriate interpretation of the tradition.

6. The answer to the objection, “No word or act of the Prophet is proved from the said tradition”, that has been given by Ḥāfiẓ Ibn al-Qayyim is vague and flimsy. He has avoided a direct rebuttal of the objection. In this connection, the argument of Ibn Ḥazm is more weighty. According to him the tradition regarding Ṭā’ūs does not in any way prove that the doer of the act or the pronouncer of the words was the Prophet himself (or Abū Bakr or any of the group of the companions of the Prophet).

7. (a) The argument of Ibn al-Qayyim that the majority of the companions of the Prophet is in favour of holding the pronouncement of three

divorces as one divorce, is erroneous. He has not been able to prove the '*ijmā'*' of the companions of the Prophet, as alleged by him. His statement that an '*ijmā'*' of the companions of the Prophet had taken place on the question during the caliphate of Abū Bakr and during the first two years of the caliphate of Umar is merely a statement with no proof. As against this the effectiveness of three divorces is stated as a dogma since the time of 'Umar by all the distinguished companions of the Prophet, the successors, the four *a'immah*, jurists, and traditionist, for instance, 'Umar, 'Abdullah Ibn 'Umar, Abdullah Ibn 'Abbās, 'Abdullah b. 'Amru b. al-'Ās, 'Uthmān, 'Abdullah Ibn Mas'ūd, Amrān Ibn Haṣīn, Abū Hurayrah, 'Alī Ibn Abī Ṭālib, Muḡhirah Ibn Sha'bah, 'Abdullah b. Zubayr, Ḥasan b. 'Alī and others. Among the successors and their followers Mujāhid, Sa'īd b. Jubayr, Aṭ'ā b. Abī Rabāh, 'Amru b. Dīnār, Mālīk b. Ḥuwayrith, Muḥammad b. Ayās bin Bukayr, Mu'āwiyah b. Abi 'Ayaṣh, Mālīk b. Anas, Abū Hanīfah, Shafī'ī, Ahmad b. Hanbal, Ibn Abi Laylā, Ja'far b. Muḥammad, Habib b. Thābit, 'Alqamah b. Qays, Nāfi', Qays b. 'Alī 'Aṣim, Suwydi b. 'Aflah, Ibn Shihāb Zuhri and 'Āsim uphold the effectiveness of three divorces pronounced at a time as such.

(b) The argument of Ḥāfiẓ Ibn Qayyim regarding the majority or '*ijmā'*' of the companions of Prophet in support of one divorce loses its force on this ground too that no difference of opinion with 'Umar has been reported of a single companion of the Prophet. This fact in itself proves the implicit unanimity ('*ijmā'*') of the companions of the Prophet on the point. Secondly, that '*ijmā'*' of the companions shall be relied upon which consists of the jurist companions of the Prophet, not of less qualified companions. The general body of the companions usually had recourse to the said jurist companions of the Prophet who held the pronouncement of three divorces at a time effective as three divorces.

(c) Moreover, Ibn Qayyim, in face of the unanimous averments of the companions, of the Prophet concerning the effectiveness of the pronouncement of three divorces as mentioned in books of traditions, bases his views in "Zād al-Ma'ād and Iḡḡathatul Lahfān", on one narrative of Ibn 'Abbās and one assertion of 'Umar (the weakness of which is apparent from Umar's own action of enforcing the pronouncement of three divorces) and that tradition which 'Ikramah reported from Ibn 'Abbās about unacceptability of which we have already dealt with in detail. It shall thus appear that the assertions of the companions from which Ibn Qayyim tried to get support for his view as compared to the averments of the senior jurists companions of the Prophet, carry no weight specially when they are weak and imprecise.

8. The argument of Ibn Qayyim that during the period of Abū Bakr an 'ijmā' on this question had already been reached is, in the first instance, not at all proved. However, assuming the 'ijmā' as proved, would it not be correct to say that the 'ijmā' reached during the period of 'Umar superseded the 'ijmā' of the period of Abū Bakr? And the 'ijmā' of the period of 'Umar continues to hold the ground till the present day. Hence the religious dictate "The pronouncements of three divorces at a time constitute three divorces" has to be followed implicitly.

9. To continue with the objections of Ibn al-Qayyim, his last arguments is that 'Umar had made the pronouncement of three divorces effective by way of punishment, and not in juristic departure from the preceeding decision and the 'ijmā'. The answer is, if during the period of Muḥammad (peace be upon him), during the period of Abū Bakr and during the first two years of 'Umar's caliphate the pronouncement of three divorces was held as one divorce how can the holding of pronouncement of three divorces as three divorces and bringing the lady under the prohibition? "He cannot after that, re-marry her until after she has married another husband and he has divorced her" (II : 230) be valid and correct? It means that a woman who had been pronounced with three divorces, deemed to be pronounced with one revocable divorce, and remained lawful for her husband, shall become unlawful for her husband when the said divorces are held as three (heterodox) divorces. If the act, was lawful (ad-hoc) in the period of the Prophet, of Abū Bakr and of early two years of 'Umar, how could the same act be held as unlawful by 'Umar? It is surprising that Ḥāfiẓ Ibn al-Qayyim, inspite of holding the act of 'Umar as his personal act, maintains the same to be not only valid but quite in accord with Shari'ah. Since no denial from the correctness of the fact of the effectiveness of the three divorces is possible for him, he gives explanations which are vague and contradictory to each other.

Conclusion :

The weight of the personality of caliph 'Umar, in our view, alone ought to have been sufficient for the proof of the pronouncement of three divorces being effective. No Muslim can dare expect of 'Umar that he, inspite of the proof (of the opinion) from the Prophet that the pronouncement of three divorces together constitute only one divorce, would hold such divorces to be three divorces impure (heterodox) i. e. he would make the wife who would be lawful to the husband unlawful to him. Also if the tradition narrated by Ṭā'ūs from Ibn 'Abbās is correct he would not have ever agreed with 'Umar. We are, however, bound by the law laid down by the Prophet. These two companions of the Prophet were the most learned

men in the law laid down by him. Had it been a settled point in *Sharī'ah* that the pronouncement of three divorces at a time were reckoned as one divorce and the same was in force while the Prophet passed away, the said companions would not have remained in dark about it. It was impossible for caliph 'Umar, who was most staunch in the observance of the *Sharī'ah*, to decide this matter against the law laid down by the Prophet and so was it impossible of Ibn 'Abbās, known as most learned among the 'Ummah, to give a verdict against the tradition of the Prophet.

It appears that the difference about the acceptance of three divorces as such pronounced at a time started from the time of the successors of the companions of the Prophet but it did not take the form of any juristic rule of conduct in as much as the people in those days depended on reports from the Prophet and not on '*ijma'*' in its early days. In particular after the consensus of opinion of the four *A'imma*, the rule of conduct of the pronouncement of three divorces at a time taking effect as three divorces, was held on all hands to be preferred in the Muslim community and remained so in practice throughout. However, in the 8th century of the *Hijra*, Ibn Taymiyyah (d. 728 A. H.) and his disciple Hāfiẓ Ibn Qayyim (d. 751 A.H.) put forward arguments in support of their views that three divorces pronounced at a time were effective as one revocable divorce. But the rule of conduct of the four *A'imma* has gained acceptance and remained in constant practice among the *sunni* sects throughout the Islamic world.

Modern Trend: During the first half of the 20th century, however, under a movement for re-statement and codification of Islamic laws, family laws ordinances were promulgated in different Muslim countries. In consequence of these laws the pronouncement of three divorces at a time was declared to be pronouncement of one revocable divorce. In the Indo-Pak sub-continent as well there is a small section of the *sunni* sect called "*ghayr Muqallid*" who supports this view. (See Modern Legislation, *infra*).

Traditions recapitulated: However, after a historical analysis of the matter we come to the conclusion that during the time of the Prophet and his companions three divorces as such took effect in the event of three divorces being pronounced at a time and consequently the husband could neither have recourse to his wife nor re-marry her without her, in the interim, being married to some other person. The traditions in support are recapitulated as under:—

1. In this connection the first *marfu'*⁸⁰ tradition is that of *li'ān* (imprecation) concerning 'Uwaymir 'Ajlāni wherein the Prophet made no comment on the act of the pronouncement of three divorces by Uwaymir. Irrespective of the fact whether the woman was the fit subject of divorce

⁸⁰ *Marfu'* in the *ḥadith* which is related to the Prophet.

or not the silence of the Prophet is the proof of the effectiveness as such of the three divorces. If the woman had not been the fit subject of divorce and the divorce had not taken effect the Prophet would, of certain, have explained the matter and clarified the nature of the mandate. Hence the silence of the Prophet on the occasion is the proof of taking effect of three divorces pronounced at a time.

2. The second *marfu'* tradition is connected with 'Abdullāh b. 'Umar which has been narrated by Bayhaqi. In its text, alongwith the facts, it is also stated, "I (Ibn 'Umar) said, O'Prophet of God ! Had I pronounced to her three divorces could it be lawful for me to have recourse to her. He replied, "No, she would have become forbidden to you and having recourse to her would have been a sin". This addition in the contents of this narrative is supported by other traditionists as well.

3. The third *marfu'* tradition concerns Abū Rukāna, which has been narrated by Ibn 'Ujayr b. 'Abd Yazid and also by Al-Shafi'ī with reliable chains of authorities to the effect that Abū Rukāna had really pronounced the divorce with the word "*battah*". The Prophet, because of this, had enquired of him, putting him on oath, as to what was his intention. In answer, he said that he had intended pronouncing one divorce. If the word "*battah*" had not created doubt about the intention of pronouncing three divorces and their taking effect as such, there was no occasion for further enquiry by putting him on oath. This supports the argument that had he intended pronouncing three divorces by that word, then, three divorces would have taken effect.

4. The fourth *marfu'* tradition relates to Maḥmūd b. Labīd. It was stated in presence of the Prophet that a certain person had pronounced three divorces at a time. The Prophet said in anger, "Has the Book of God become a play-thing in spite of my persence amongst you". But having heard that the person had pronounced three divorces at a time, he neither annulled that man's action nor he directed that man to have recourse to his wife. The Prophet's maintaining silence herein is the proof of the effectiveness of the pronouncement of three divorces at a time.

5. The fifth tradition is narrated by 'Āishah which has been reported by Muslim wherein is mentioned pronouncement of three divorces to a wife prior to sexual intercourse with her. It is a strong authority on the point of effectiveness of three divorces pronounced at a time.

Besides these traditions of the Prophet there are some traditions of the companions of the Prophet (*āthār*) which, too, are proof of the fact that in the event of three divorces being pronounced at a time three divorces

shall take effect certainly. In fact, on this view of the matter there are three traditions (*āthār*) of 'Umar, twelve of Ibn 'Abbās, five of 'Alī, six of Ibn 'Umar, three of Abū Hurayrah, six of 'Abdullāh b. Mas'ūd, one of Muḡhīrah b. Sha'bah, one of Imrān b. Al-Ḥaṣīn, one of Abū Musā Ash'ari, two of 'Amru b. Āṣ, two of Hasan b. 'Ali and one of Mu'adh b. Jabal. These traditions of the companions that have been authenticated by reliable authorities like Bayhaqi, Dar-Qutni, Abū Dā'ūd and others, are clear proof of the fact that during the period of the companions of the Prophet the pronouncement of three divorces at a time did take effect as three divorces.

After the evidence of the companions of the Prophet there are, in connection with the simultaneous effect of three divorces, the averments of most of the successors of the companions of the Prophet and the successors of the successors also. Amongst them, are Mujāhid, Sa'īd b. Jubayr, 'Aṭā b. Abi Rabāh, 'Amru b. Dinār, Mālik b. Ḥuwayrith, Muḡammad b. Ayās b. Bukayr, Muawiyah b. Abī 'Ayāsh, Mālik b. Anas, Abū Ḥanifah, Muḡammad b. Idrīs Al-Shafī'ī, Aḡmad b. Ḥanbal, Ibn Abi Layla, Ja'far b. Muḡammad, Habib b. Thabit, 'Alqamah b. Qays, Nafi', Qays b. Āṣim, Suwaid b. 'Aflah, Ibn Shihab al-Zuhri and others.

Thus, during the period of the Prophet and during that of his companions as well the pronouncement at a time of three divorces was accepted as three effective divorces and considered to be the rule of *Shari'ah*. As against this there is only one narrative from Ibn 'Abbās which has been recorded by Muslim. The said narrative as regards its words is open to several interpretations :—

1. Firstly, from the tradition regarding Abū al-Ṣahbā it appears only that during the period of the Prophet, of Abū Bakr and the early period of 'Umar people used to pronounce three divorces and these were considered as one divorce. From the words of the tradition it is not clear whether the dictate of treating the three divorces as one was limited to the wives with whom intercourse had not taken place. In the case of a wife with whom intercourse had not taken place, undoubtedly one pronouncement is enough, if even pronounced with the word, "Divorce, Divorce, Divorce". As the observance of the term of probation is not incumbent on that woman she does not remain a fit subject for the last two divorces. In the second case, however, (i.e. in the case of intercourse having taken place) if the divorce is pronounced thrice with the words, "You are divorced" the practice during the period of the Prophet was that the first words of divorce meant pronouncement of one divorce, while the second and the third words of divorces were meant only to emphasise the first pronouncement of divorce, so that all three could be taken to be as the pronouncement of one divorce. And if the divorce was pronounced with the phrase "Three

divorces" the same was held to be the pronouncement of three divorces, whether intercourse had taken place or not.

2. Secondly, in this tradition there occur such words, "تجعل الثلاث واحدة" which apparently mean that the pronouncements of three divorces were "made" as one divorce. This was taken in the sense that the pronouncement of three divorces at a time would not mean the pronouncement of three divorces, rather it was taken to mean the pronouncement of one divorce (i. e. it covered the pronouncement of three divorces at a time either with one word or with three words). This is open to several interpretations, in as much as the last two were accepted as mere emphasising facts the resultant divorce was one revocable. As the three divorces were "made" one the original effect by itself was not of three divorces. The interpretation of laying of emphasis was more prevalent in the time of the Prophet, during the time of the caliphate of Abū Bakr and during the early period of the caliphate of 'Umar and it was so acted upon. After that the practice of laying emphasis came to an end and the three divorces were accepted effective in the known way ('urf) i. e. heterodox way. People instead of laying emphasis made it three-fold. On account of this, when Caliph 'Umar maintained these three divorces, in the new sense, as the pronouncement of three divorces, no one repudiated the interpretation. On the other hand, there is no question of any emphasis in the event of the pronouncement of three divorces with one phrase at a time, or in one sitting. Pronouncement of three divorces with one phrase whether or not intercourse had taken place with the divorcee shall take effect as three divorces.

3. Thirdly, the words, "تجعل الثلاث واحدة" may duly mean, "It used to be one instead of three". That is to say, the people in those days pronounced only one divorce. This interpretation is corroborated by the very words of the same traditions: "Umar stated that people began to make haste in the matter in which they were to be deliberate". This indicates the fact that previously people pondered over the pronouncement of divorce and did not pronounce three divorces at a time. This is also corroborated by the words occurring in another version of the *ḥadīth*, "that people began pronouncing divorces one after the other" (i. e. in the same sitting one after the other). Therefore, as the practice changed, caliph 'Umar accepted the pronouncement of three divorces effective as such. In corroboration of this meaning of the tradition a part of a Qur'anic verse, "اجعل الالهة الهًا واحدًا" (XXXVIII : 5), which literally translated means : "Has he made the gods into one Allah", may also be cited. The real meaning of the verse is, "Instead of all Gods one God," and not "All Gods taken together were made into one God". Likewise the proximate meaning of the words of the

tradition, “تجعل الثلاث واحدة” shall be taken to be, “Instead of three divorces only one divorce was pronounced”, and not that the three divorces together used to be pronounced and that those (three divorces) were considered to be one.” It can thus be easily concluded from this that during the time of the Holy Prophet the people generally used to pronounce one divorce. So, they did pronounce one divorce in the time of Abū Bakr. Indeed, after the early period of the caliphate of ‘Umar the method of pronouncing divorces one after the other at the same time became a practice of the people, which he duly enforced.

Further, as against this narrative of Ṭā’ūs which has been recorded by Muslim in his “Ṣaḥīḥ” there are about a dozen assertions of Ibn ‘Abbās wherein he has given his verdict of the effectiveness of the pronouncement of three divorces. It is a juridical rule that when a narrator goes on giving verdicts against his own narrative and acts in contravention of the same, it is a clear proof of the fact that the narrative is unreliable. The reason is simple. A tradition reported by a single narrator might be a matter of strong presumption for any one else except for the narrator (whose authenticity is at stake) who otherwise admits himself fallible. For such a narrator to act against his own report from the Prophet and give verdicts contrary to the report can have but one conclusion viz, the report is unauthentic. There is another question that comes to mind as to why there arose a point of view against the effectiveness as such of a triple divorce pronounced at one time. Firstly, it appears that Ṭā’ūs misunderstanding completely the factual position of the incident of Abū Rukāna put a wrong interpretation on it and posed a question to Ibn ‘Abbās which was not according to facts. Secondly, the compassion generally felt these days over the hardship to parties to a divorce especially in a triple divorce sub-consciously led to the repudiation of the stand taken by Caliph ‘Umar.

Some more objections : People, who are not for holding the pronouncements at a time of three divorces effective, put forward an argument : It does not stand to reason that a person by pronouncing at a time three impure divorces can altogether break up the marriage-tie that endured for long time, say for eighteen years. This, according to them, is contrary to the basic ethical values of Islam. The answer to the objection is that one should not confuse the act with its effect viz. legal consequences. Pronouncing of “three divorces at a time” is not righteous in the eyes of Allah and His Prophet. It is an undesirable act from the ethical point of view, yet the performance of that act i. e. the pronouncement of three divorces at a time shall take due effect and shall be binding in consequence. Instances similar to the above can be easily cited :—

1. A person enjoys good life for, say, twenty years with his wife and children. He, because of some reason, commits suicide. He thus puts his wife and children in misery. This action, inspite of being unrighteous, he could perform and did perform. The effects and results of his action shall necessarily follow. Similarly, a person wishes to effect separation from his wife and does so by pronouncing three divorces at a time. This act of his in its consequence and result shall be held to be effective.
2. A person keeps his wife and children naked and starved and whatever he earns squanders away on other women and wine. On complaints by the wife he thrashes her. Islam does not permit these things. In spite of religious prohibition, he does so. Certainly the commission of such acts by him shall be unrighteous yet they will have physical and legal consequences.

If a plea is taken that to avoid the dire consequence of a triple divorce for a woman and orphanage for the children, their pronouncement should result in one revocable divorce only, the answer is as follows :—

1. If someone murders another and the court on proof orders that man to be hanged till death without taking the fact into account that his wife would become a widow and his children would become orphans and helpless. Shall the action of the Court be held wrong ?
2. If a man having a wife and children commits adultery or a Muslim female in wedlock does the same then under the *Shari'ah*, on the adultery being proved, the penalty for them is stoning to death. In such case also their child becomes orphan. Shall it be cruelty?

The objectors may further say that if during the auspicious period of the Prophet the pronouncement of three divorces with one phrase were given effect to as three divorces, the pronouncement of three divorces with one phrase or at a time, too, ought to be considered as divorce quite according to tradition of the prophet, 'طلاق السنة'. And if this divorce is in accordance with the tradition of the Prophet, how then its pronouncer can be held to be an innovator and a sinner and liable to punishment. If the pronouncement of three divorces with one word or at a time is an innovation, it would not then be called according to the Prophet's *sunnah*.

This objection is based on a fallacy. Two factors are worth consideration in connection with three divorces pronounced with one word or pronounced at a time : One is the effecting of the divorces (by the

pronouncer) and the other is "their taking effect" (the legal consequences). There can be no two opinions about the fact that the Prophet of God and his companions disapproved the effecting of divorces in that manner. So far as the taking effect of such divorce is concerned it is in accord with the traditions of the Prophet discussed earlier. The taking effect of such divorce in view of the traditions stated in the foregoing pages is established. In other words, the pronouncement of three divorces with one word or at a time is, so far as their pronouncement is concerned, an innovation, and as far as their taking effect is concerned, it is in accord with the tradition. On this basis there is an averment (quoted by Ibn Rushd) of Al-Shāfi'ī to the effect that the pronouncement of three divorces is also in accord with tradition. Ibn Ḥazm too calls the same to be in accord with tradition. Indeed, the Ḥanafīs in this respect have given proof of the subtlety of their perceptions. They analyse such divorce from two aspects : Its pronouncement (they say) is innovation and its taking effect is in accord with the Prophet's tradition i. e. it stands traced to the tradition of the Prophet. After this explanation, the objection of punishment for following a *sunnah* is by itself removed. Because the Prophet has forbidden the pronouncement of such divorce, any one who does so is a sinner and by way of chastisement he shall be held liable to punishment (though the legal consequences shall, according to tradition, duly follow).

Those who are of the view that pronouncement of three divorces amounts to but one divorce, advance this arguments on *Qiyās*, as well, that Islam wants the marriage-tie to endure. Holding the pronouncement of three divorces at a time as three effective divorces is against the stability and spirit of the marriage relationship and the intentions of Islam. Hence, the pronouncement of triple divorce ought to be held as the pronouncement of one revocable divorce. The answer is as below :—

1. Firstly, *Qiyās* being against *sunnah* cannot form the basis of argument. There is ample evidence that during the periods of the Prophet and his companions the pronouncement of three divorces was held as three effective divorces.
2. Secondly, the Qur'ān teaches the best method of pronouncing divorces. It clearly lays down that divorce is permissible only twice. Then comes the holding together or the separation (of the wives) on equitable terms. It makes three things clear. Firstly, that the husband has the right of pronouncing three divorces. Secondly, that after the first two divorces the husband has the right of recourse during the corresponding period of probation. And thirdly, that thereafter the husband has the option to keep

up the relationship intact or give it up. There is in the verse no intendment to pronounce upon the taking effect of divorces. To take the verse to mean that in the event of the pronouncement of two or three divorces at a time they shall be ineffective or that only one revocable divorce shall take effect is not textually warranted.

Undoubtedly, Islam wants permanence and stability in the relationship of marriage. That is why it strongly recommends a revocable divorce. If, however, a person instead of revocable divorce pronounces irrevocable divorce or irrevocable heterodox divorce its legal consequence cannot be avoided on philosophical grounds. If a facility that is provided by law is not availed of the fault is not that of the *Shari'ah*.

Suggestion :

There is, indeed, one possible way out in which the intent of the Holy Qur'ān may also be carried out, contravention of the tradition avoided, and the Muslim community may as well be saved from committing a sin. It is that the Islamic State should enact a law permitting pronouncing one revocable divorce on the lines of the most proper divorce (طلاق الاحسن). It may also be provided that the pronouncement of a divorce, contrary to the one as permitted, shall be effective but the contravention shall be liable to punishment (as is established from 'Umar). It shall, however, be necessary that before such law is enacted public opinion may be educated as to the real state of the *Shari'ah* law and the feasibility of the proposed legislation, because the people of this sub-continent do not consider the pronouncement of less than three divorces at a time as real divorce.

Modern Legislation :

In case of the Sunnīs the traditional law in all Muslim countries, till the first quarter of this century, was that the pronouncement of three divorces at a time shall be counted as three divorces. But a law in 1929 was enacted in Egypt under which all divorces, except the divorce pronounced before penetration, *khul'a* and such pronouncements of three divorces that were regularly pronounced in three periods of purity, were held to be revocable divorces.⁸¹ In Sudan too the pronouncement of three divorces was, in 1935, held to be one revocable divorce.⁸² In Syria as well the law of pronouncement of three divorces was brought in accord with that of Egypt in

⁸¹Qanūn al-Miṣri No. 25 of 1929.

⁸²Qanūn al-Ā'ili, Sudan, No. 41 of 1935.

1953 and the pronouncement of three or more divorces at a time was held as pronouncement of one revocable divorce.⁸³ In Iraq, the divorce pronounced with the word "three" was brought under the definition or description of one divorce through a law enacted in 1959.⁸⁴ Laws on this pattern were also enacted in Morocco⁸⁵ and Jordan⁸⁶. In Tunisia, the taking effect of divorce has been made dependent on the order of a judge (*Qāḍī*). Similar is the case in Singapore. But in Lebanon and Indonesia the three divorces pronounced at a time shall take effect as three (heterodox) divorces. In India also there is no change in the traditional Sunni law in this respect.

Tunisia :

It is the Tunisian Law of Personal Status, 1956, however, which provides the most radical change of *Shrī'ah* law in this regard. The essence of the Tunisian Law lies in the complete abolition of extra-judicial divorce, whether by *ṭalāq* or mutual consent. In detail, section 31 of the Law provides that a decree of divorce will be granted : (i) on a petition by the husband or wife based on any of the grounds specified in the Law; (ii) in cases of mutual consent; (iii) when either husband or wife insists on ending the marriage, in which case the court will determine "what financial indemnity the wife shall be granted by way of compensation for the damage she has sustained, or what compensation she shall pay to her husband". Section 32 of the Law then provides that "A decree of divorce shall not be given until the court has first exerted itself to the utmost in investigating the causes of dissension between the spouses and has failed to reconcile them." The Tunisian Law, then, entirely sweeps away the traditional distinction between a revocable and an irrevocable form of divorce. In all cases the marriage continues to exist, until the court issues a decree of divorce.⁸⁷

Algeria :

In Algeria, too, article 6 of its Ordinance (No. 59-274 of 1959) provides that a marriage may, apart from the death of either spouse which would in itself effect termination of the marital bond, be dissolved only by a Judgement of the Court. Such a judgement may be issued by the Court on the application of either spouse.

⁸³Qanūn al Aḥwāl al-*Shakhṣiyah*, Syria 1953.

⁸⁴Qanūn al-Aḥwāl al-*Shakhṣiyah*, Iraq, No. 188 of 1959.

⁸⁵Mudawwanatul Aḥwal al-*Shakhṣiyah*, Morocco.

⁸⁶Qanūn al-Huqūq al-*Ā'ilah*, Jordan.

⁸⁷Coulson : *Muslim Law of Family Relations*, Edinburg, 1971.

Pakistan's current law on Divorce :

All sorts of divorces have been brought under the order of a revocable divorce in Pakistan too as a result of the enactment of Muslim Family Laws Ordinance No. 8 of 1961. Apparently, the recommendations of Family Laws Commission in respect of holding the three divorces as a revocable one have been accepted. The recommendation in respect of the question of "Divorce with the word, *three*" were made by all the Members of the Commission except Mawlana Ihtashamul Haq Thanwi. In the said Report, the Qur'ānic verse "A divorce is permissible only twice" and a few traditions have merely been cursorily mentioned. The points of views of *A'immaḥ Mujaḥidīn* have not been properly presented. Indeed, this question has thoroughly been examined in the pages of this book, which has objectively gone into all relevant discussion on the subject.

Following is the relevant Section of the Pakistan Muslim Family Laws Ordinance No. 8 of 1961 :

7. (1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *ṭalāq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Save as provided in subsection (5), a *ṭalāq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *ṭalāq* is pronounced, *ṭalāq* shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by *ṭalāq* effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

Criticism :

On a deep study of the current law on divorce in Pakistan, viz Section 7 above, we come across regulations and conditions about which neither any detail is found in the report of the Commission nor any precedent is available in Islamic jurisprudence or in the current laws of any Islamic country (excepting Tunisia and Turkey). For instance :

1. It has been made compulsory to inform in writing the Chairman of the Union Committee after pronouncing divorce to the wife.
2. The pronouncement of divorce has been made to remain ineffective for ninety days of its written intimation having been received by the Chairman of the Union Committee (whereas no period is fixed for giving intimation to the Chairman).

The effect of these provisions is that the taking effect of the divorce is kept in abeyance for ninety days after its written intimation is received by the Chairman. Let it be supposed that a husband pronounces a revocable divorce to his wife in the presence of witnesses and the wife. He does not give the written intimation as required by the said section to the Chairman nor by words or deeds the husband has recourse to his wife. The divorce pronounced in the circumstances, shall according to the dictates of Allah, the tradition of the Prophet, the consensus of opinions of the companions of the Prophet and *A'imma*h becomes effective. Whereas under the aforesaid law the said divorce shall be held not to have taken effect. The case in point is that of *State vs. Tauqir Fatima* (PLD 1964 Karachi 306). The wife, Tauqir Fatima in this case, had filed an application under section 488 Cr. P. C. against her husband for her maintenance. The Magistrate granted her application on 14-11-1960 and ordered the husband, Shamsul Hasan to pay Rs. 50/- in cash per month to the wife as her maintenance allowance. The husband, thereafter filed an application before the Magistrate on 6-9-1962 to the effect that he had pronounced three irrevocable divorces to his wife and had tried to give a written information about it to the wife who refused to receive the same. He filed a copy of the written information and maintained that he divorced her that day. He prayed the order passed for the maintenance dated 14-11-1960 be therefore amended (i. e. the order for payment of maintenance allowance after expiry of the term of probation as on 6-12-1962 be cancelled) in as much as he had pronounced three irrevocable divorces to his wife. The lower court accepting the prayer of the husband, passed orders for paying the maintenance allowance only till the period of observance of her term of probation. On Revision filed by the wife and thereafter on the Reference made by the Revisional Court, the High Court held that as under section 7 of the Family

Laws Ordinance no notice was given to the Chairman, and the divorce pronounced could take effect only after ninety days of the receipt of the notice, therefore divorce pronounced, according to husband, on 6-12-1962 remained ineffective, (because no notice of *ṭalāq* had been given to the Chairman, Union Council).

This is exactly how the Ordinance contravenes the provisions of the law it is supposed to rationalise. The fact that the husband had pronounced divorce to his wife according to the tenets of Islam is patently clear. But the High Court through its order dated 16-12-1963 held the said pronouncement of divorce to be ineffective and regular payment of maintenance allowance to the wife incumbent. According to Islamic law, after the husband had informed the court that he had divorced the wife, it ought to have held that the pronouncement of divorce became effective and that only the maintenance allowance of the wife till the period of her *'iddat* was due on the husband.

All kinds of divorces (including triple divorce) have been indiscriminately brought under the purview of the law of revocable divorce by section 7 of Family Laws Ordinances. And in case of failure of reconciliation between the parties their entering into fresh marriage contract after the completion of the term of probation has also been allowed. While according to *Shari'ah* after the marriage-tie has been snapped off by triple divorce, no re-marriage between the couple is allowed without the wife being made lawful, by an intervening consummated marriage.

Further, under the said section 7, the husband after pronouncing a revocable divorce to his wife cannot, by either words or deed, have recourse to her without her consent. Let it be supposed that a wife at heart is desirous of obtaining divorce. The husband, according to section 7 of Family Law Ordinance, pronounces one divorce to his wife; thereafter he seeks to have recourse to her. The wife, under section 7, being a party, refuses her husband to have recourse to her. How then the unanimously accepted religious dictate with regard to *Raj'at* (having recourse to), can be put into effect under the said section 7?

A further question arises as to from what date would the counting of probation period begin if the divorce takes effect after ninety days of its notice to the Chairman? If the counting of the period of probation begins after ninety days, the right of having recourse to of the husband, too, shall exist till then. What then shall be the order with respect to recourse during the period between divorce and notice of divorce? (For Further anomalies see Section 37, pp. 163-66 *supra*.)

Pakistan Courts' View :

All divorces revocable : Under S. 7 of the Ordinance no divorce is irrevocable. *Talāq* in whatever form pronounced would become effective on the expiry of 90 days after notice of it is given to the Chairman. If no notice is given to the Chairman, the *ṭalāq* would not become effective, because according to clause 3 of S. 7 the period is to be calculated from the date of the notice to the Chairman and not from the date of the pronouncement of the *ṭalāq*. [PLD 1964 Kar. 306—16 DLR (W.P.) 104; PLR 1963 (1) W.P. 356—PLD 1963 S.C. 51—1963 (1) P.S.C.R. 356 15—DLR S. C. 9.]. During the period between the pronouncement and its becoming effective, it cannot be said that the marital status of the parties in any way undergoes a change. They still continue in law to be husband and wife. (PLD 1963 Supreme Court 51-1963 (1)-PSCR 356-15 DLR S.C. 9).

From a comparison of form of *ṭalāq* it appears that under S. 7 the Ordinance has enforced in Pakistan a kind of *ṭalāq* which is in consonance with *ṭalāq-i-aḥsan* and *talāq-i-ḥasan*. In the case of *Talāq-i-aḥsan* the divorce becomes irrevocable after the period of 'iddat, and in case of *ṭalāq-i-ḥasan* it becomes irrevocable on pronouncement for the third time in the third *ṭuhr* after the first pronouncement. Thus the least period after which *ṭalāq* becomes irrevocable according to *Talāq-us-Sunna*, i.e. approved form of divorce is approximately 90 days. In this sense there has been no change in Muslim Law. On the other hand, it has been consolidated and enforced by the Ordinance. The only form affected by the Ordinance is the *Bida'ī* form which becomes effective immediately after it is either uttered orally or written down on a piece of paper or on something else from which it can be deciphered. (PLD 1962 Dacca 630—13 DLR Dacca 533). Now even a *ṭalāq* in that form will become effective after the expiry of 90 days.

Notice of ṭālaq' to wife : Under the traditional Muslim law, no notice of *ṭalāq* was required to be given to the wife and in the case of a written *ṭalāq*, the *ṭalāq* became operative from the time of writing and not from the time when it is received by the wife. (PLR 1964 Dacca 377—PLD 1951 Lah. 467—PLR 1951 Lah. 719—AIR 1937 Lah. 611. Baillie 234-(1905) 31 Bom. 537—AIR 1937 Lah. 270). That could obviously cause grave injustice where the husband executed a *ṭalāqnama* but did not communicate it to his estranged wife; but this has been remedied under Muslim Family Laws Ordinance.

Under S. 7 of Muslim Family Laws Ordinance it is obligatory on the husband to give a copy of the notice to the Chairman and also to the wife and if he does not do so he will be liable to prosecution under sub-section (2). But otherwise the notice will have no effect on the validity of the *ṭalāq*

or the date on which the *ṭalāq* becomes effective. Where the whereabouts of the wife are not known and cannot be ascertained by the husband with due diligence it has been provided in the Rules that notice may be served on her with the permission of the Chairman through her father, mother, adult brother or adult sister. But if she has no such relation or where their addresses cannot be ascertained with due diligence, the husband may, with the permission of the Chairman, serve the notice of *ṭalāq* on her by publication in a newspaper, approved by the Chairman. It is however, necessary that the newspaper should have circulation at the place where he last resided with the wife. (West Pakistan Rules, R. 3 (a) substituted in 1965).

Validity of Talāq and Notice : In the case of *Mrs. Parveen Chaudhry* it was held by a Division Bench of Sind High Court that "in regard to the validity of the divorce we have no hesitation in expressing our confirmed opinion that under the Muslim Personal Law as well as the Ordinance no mode is prescribed for pronouncement of divorce. It is established law that a Muslim can pronounce a divorce orally or convey the divorce in writing. In fact, under the Muslim Personal Law a divorce in writing became irrevocable as soon as the same was written but the Ordinance has made inroads into the Muslim Personal Law by providing a machinery and procedure for confirmation of the divorce and postponement of its effect for 90 days. We may also examine the provisions of sub-section (1) of section 7 in such context and the conclusion is inescapable that this provision only provides for giving a notice of *ṭalāq* to the Chairman and a copy thereof to the wife. Subsection (2) of section 7 makes the position further clear by providing a punishment for contravention of provisions of subsection (1). As stated above the only impediment to immediate effectiveness of the divorce is information to the Chairman and the forming of the Arbitration Council. To such extent it is very clear to us that the mere fact of absence of communication of the divorce before moving the Chairman under subsection (1) of section 7 of the Ordinance does not invalidate the divorce." (PLD 1976 Karachi 416).

In the case of *Inamul Islam vs. Mst. Hussain Bano* and others a single Bench of the Lahore High Court, however held thus: "I do not agree that the service of copy of the notice under subsection (1) of section 7 of the Ordinance is not essential to make a divorce effective. There are three important requirements under Subsection (i) of section 7 : (1) pronouncement of *Talāq* in accordance with Muslim law; (ii) service of the notice on the Chairman; and (iii) service of copy of the notice on the wife. If any one of these conditions is not satisfied, the *Talāq* would not become effective even after ninety days. The supply of copy to the wife is a necessary part

of the requirement of service of notice on the Chairman. Similarly, the provision is clear that the notice to the Chairman shall have to follow a pronouncement of *Talāq*. Thus, that is also a mandatory requirement.” (PLD 1976 Lahore 1466),

Presence of Spouses : It was also held by the same Bench of Sind High Court in the above-noted case that “on a plain reading of provisions of section 7 it is very clear to us that the presence of the spouses is not mandatory by virtue of the provisions of section 7 of the Ordinance. All that subsection (4) of the said section postulates is the forming of the Arbitration Council by the Chairman for the purpose of bringing about a reconciliation between the parties, and the said Council shall take all steps necessary to bring about such reconciliation. Without any doubt, an Arbitration Council was formed and the spouses had nominated their respective representatives. The record of the respondent Civil Judge also clearly shows that the representatives appeared before the Civil Judge and it is further clear from the record that in spite of several adjournments, reconciliation between the parties was not possible. We find that on 14-9-1974 and 24-9-1974, the representatives of both the parties were present but no reconciliation could take place.” (PLD 1976 Karachi 416).

The same Bench of the Lahore High Court in another case *Rashida vs. Ghulam Raza and Others* observed: “The learned Family Judge held that the *ṭalāq* as described in the divorce deed (Annexure B) was *ṭalāq-ul-bid'at*. He also held that respondent being a Shi'ah, such a *ṭalāq* could not operate as divorce. I agree that the *ṭalāq* could not be treated as *ṭalāq-ul-bid'at* with all its necessary consequences; but I do not agree with him on the question that it was no *ṭalāq* at all. Sub-section (1) of section 7 of the Ordinance provides that the ‘pronouncements’ of *ṭalāq* after the enactment of the Ordinance, could be “in any form whatsoever”. The intention of the law makers, it appears, was that even if the *ṭalāq* is in any particular form including *bid'at*, it will have effect in accordance with the provisions contained in section 7. The special consequences of *ṭalāq-ul-bid'at* would be removed and the *ṭalāq* simpliciter in question, in this case, would become effective on the expiry of 90 days after the receipt of notice by the Chairman unless revoked earlier (see sub-section (3) of section 7)...Thus, *ṭalāq* having admittedly been pronounced on 15-10-1969 through a jointly executed divorce deed (Annexre B), it would normally have become effective on the expiry of 90 days after the receipt of notice by the Chairman.” (PLD 1977 Lahore 363).

It was further observed by the learned Judge: “Howsoever short the time-lag between the two acts of pronouncement and sending the

notice may be, yet the intention of the law makers was that as the term "pronouncement" has not been defined in the Ordinance, therefore, the ordinary Muslim Law on pronouncement of a divorce shall continue to apply notwithstanding the provisions of Muslim Family Laws Ordinance. For example, if a wife denies or disproves the two essential requirements; one, pronouncement of *ṭalāq* and two, the receipt of the copy of the notice by her; then notwithstanding the fact that the husband is able to prove the third requirement namely, that he gave the Chairman "a notice in writing of his having done so" (i. e., pronounced the *ṭalāq*), the mandatory provision of subsection (1) of section 7 would not be deemed to have been complied with. Similarly, the word "revocation" has not been defined in the Ordinance nor any procedure has been prescribed as to how that *ṭalāq* could be revoked. Applying the same reasoning *qua* the "pronouncement" of *ṭalāq* to "revocation" thereof, it is held that the general Muslim Law would govern all aspects of revocation procedural and substantive." (*Ibid.*)

Suggestion :

It is in line with the policy of *Shari'āh* that the Arbitration Council is constituted before the pronouncement of divorce by the husband. It is provided in the holy Qur'ān, "If ye fear a breach between them twain, appoint (two) arbiters : One from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation : For Allah hath full knowledge, and is acquainted with all things." (Al-Nisā, IV : 35).

So far as keeping the effectiveness of divorce in abeyance for ninety days and making the counting of the ninety days begin from the date of the receipt of its notice by the Chairman are concerned, they are blatantly against the *fiqh* of all the Shi'ah and Sunni sects and should not disfigure the statute book of an Islamic country. It is therefore necessary that the said section 7 of Muslim Family Laws Ordinance, 1967, be reviewed and amended in accordance with the religious dictates largely accepted and practised upon by the 'Ummah.

Section 121. If the marriage with a wife remains unconsummated (that is, without sexual intercourse) and she is divorced by her husband with three divorces by one phrase, the three divorces shall together take effect and that woman, without an intervening consummated marriage, shall not be entitled to recontract marriage with her former husband.

Divorce and
unconsummated
marriage

If, however, the three divorces are pronounced separately, as divorce, divorce, divorce, the first divorce shall take effect

as one irrevocable divorce and the other two divorces shall be futile, in such an event a fresh marriage may be contracted between the parties without an intervening marriage.

COMMENTARY

It is settled law that the pronouncement of one divorce to a wife whose marriage has not been consummated makes her irrevocably divorced and no term of probation is to be observed by her. But there is a difference of opinion on the point whether the pronouncement of three divorces at a time by one phrase would in case of such a wife take effect as three divorces or as one divorce only. The jurists who are against the taking effect of three divorces pronounced at a time (on account of their holding it as one irrevocable divorce) do not see any wrong in the couple getting themselves remarried without an intervening marriage of the woman. The jurists according to whom the pronouncement of 'three divorces' does take effect as three divorces, introduce the condition of the women being made lawful by an intervening marriage. However, there is no difference on the point that the three divorces if pronounced separately, i. e. divorce, divorce, divorce, the wife whose marriage has not been consummated would become irrevocably divorced by the first pronouncement of divorce and the other two divorces would be superfluous. In such a case there is no need of the woman being made lawful by an intervening marriage and the man and woman by mutual consent may recontract marriage with each other.

Muḥammad Al-Shaybānī in his book *Muwatṭʾā* has, through Mālik b. Anas on chains of authority of Zuhri, Muḥammad b. Abdur Rahman b. Ṭhawbān and Muḥammad b. Ayās b. Bukayr, narrated that a person, before having intercourse with his wife, pronounced three divorces (collectively) to her. Thereafter, he wanted to recontract marriage with her. He came to Ibn Bukayr to inquire about it. Ibn Bukayr says that he too went with him. He made inquiries regarding the proposition from Abū Hurayrah and Ibn 'Abbās. They said that he could not recontract marriage with her unless she had married and cohabited with another person. The inquirer said to Ibn 'Abbās that her wife became *bā'in* (separated) merely from his one divorce, (how is it that legal effect is being given to three divorces). Ibn 'Abbās replied, "you yourself lost your right." Muḥammad al-Shaybānī, after narrating this tradition states that we (the Ḥanafīs) do act upon it. Same is the rule of conduct of Abū Ḥanīfah and most of our jurists.⁸⁸ Since the said person had pronounced three divorces collectively, all the three became effective. Had he pronounced three divorces sepa-

⁸⁸Muḥammad al-Shaybānī : *Muwatta*, Karachi, 259.

rately, one after the other, only the first divorce would have become effective, as the marriage being unconsummated, the woman should have become *bā'in* (separated irrevocably) with the pronouncement of the first divorce.

Modern Legislation :

As a result of modern legislation in various Middle Eastern Muslim countries there has been recognized no distinction between the divorce pronounced before consummation, whethor it be three divorces or one, pronounced together or separately. It shall be one irrevocable. Rather, all divorces, except the one before consummation, or being the third in the series (الثلاث), divorce pronounced in lieu of consideration (*Khul'a*) and *ṭalāq al-tafwīḍ* (delegated divorce), have been declared by law as revocable. Curiously enough, Pakistan law, in sections 7 and 8 of its Ordinance VIII of 1961, recognizes no such distinction, upon which there is little difference in the *Ummah*, that divorce pronounced before consummation shall be irrevocable. There is no *raj'at* in it.

CHAPTER—XV

Option of Puberty (Khiyar al-Bulugh)

Section 122. The right of a minor boy or girl, on attaining ^{“Option of Puberty” defined} puberty, of repudiating their marriage got contracted by their guardians during their minority, is called the “option of puberty”, (Khiyār al-Bulūgh).

Section 123. The minor boys or girls on attaining puberty have ^{Right of “Option of Puberty”} the right of exercising their “option of puberty” and repudiate their marriage got contracted during their minority by their guardians, including their fathers and grand-fathers.

COMMENTARY

If a Muslim minor boy or girl has been married during minority by the guardian, the minor has got the right on attaining puberty (physical majority) to repudiate such marriage. This is called “Khiyār al-Bulūgh”.

Hanafi law :

According to Hanafi school of law, barring Abū Yūsuf,¹ there is consensus of opinion that the marriage of minor boys or girls, got contracted during their minority by their guardians, other than their fathers or grand-fathers, may, on their attainment of majority, be repudiated by them.²

¹According to Abū Yūsuf a minor boy or girl has not got the option of puberty whether the marriage has been contracted by her father or grand-father or any other guardian. If, however, the marriage has been contracted with an unequal (See Chap. VI *supra*) or the dower that has been settled upon is less than the proper dower, then, according to Abū Yūsuf and Muḥammad the minor girl, on attaining her age of majority can exercise her right of the option of puberty.

²Qāḍī Khan : *Fatāwa*, vol. i, Kitāb al-Nikāḥ, p. 166 :

”واذا بلغ الصغير والصغيرة وقد زوجها الاب والجد لاختيار لهما، ولهما خيار البلوغ في نكاح غير الاب والجد عند ابي حنيفة و محمد وقال ابو يوسف لاختيار لهما“

Maliki and Shafi'i law :

According to Mālikīs, as the father only and according to Shāfi'īs the father and grandfather only, have the right of guardianship in marriage contracts of their minor children, the question of exercising the option of puberty in the marriage got contracted by any guardian other than the father or grandfather does not arise. Marriage got contracted by the other guardians, according to these schools of Muslim law, are invalid.

Shi'i law :

According to Shi'ah jurists as well the option of puberty cannot be exercised in the marriage got contracted by the father or grandfather. If the marriage of a minor boy or girl is got contracted by a guardian other than the father or grandfather, it will depend for its validity on consent obtained from the father or grandfather, as the case may be. If the consent is given the marriage shall be valid, otherwise it shall be void. After the consent is given it shall be as effective as the marriage got contracted by the father or grandfather themselves, and in such cases as well the minor boy or the minor girl on attaining their physical majority shall have no right of repudiating the marriage contract.³

Doctrine of Hanafi law Analysed :

Although the Doctors of Ḥanafī school of law are all unanimous on the point that the option of puberty as a matter of pure right cannot be exercised in case of marriage got contracted by the father or grandfather, Abū Yūsuf and Muḥammad al-Shaybānī, however, are of the view that a girl, after attaining her puberty, can exercise her option of puberty in case she has been married on an insufficient dower, or with a socially unequal person in spite of the fact that her marriage was got contracted by her father or grandfather. Abū Ḥanīfah is against the right to exercise the option of puberty for the purpose of invalidating such contract of marriage on the ground of mere non-equality or insufficiency of dower.

First contention : In this connection Abū Ḥanīfah and other Ḥanafī jurists rely on two contentions. One is based on the tradition of the Holy Prophet and the other on the rule of '*istiḥsān*'. The contention based on the tradition is that the Prophet contracted his marriage with 'Ā'ishah on five hundred *dirhams* as dower. The marriage was got contracted by her father during her minority. Likewise, Prophet himself got his daughter Fāṭimah contracted into marriage with 'Alī on four hundred *dirhams* as dower. In both these cases the dower was less than the proper dower. In spite of it none of them exercised the right of option of puberty.

³All Ḥillī : *Sharā'i' al-Islam*, Kitāb al-Nikāh, Tehran, p. 175.

Criticism: The argument of these jurists, based on the facts that the Prophet, peace be on him, contracted his marriage with 'Ā'ishah, and 'Alī contracted his marriage with Fatimah on less than the proper dower and inspite of that none of them (i.e. 'Ā'ishah or Fāṭimah) exercised the right of the option of puberty, is not sound. The "option of puberty" is an optional right, it may or may not be exercised. The non-exercise of the right does not mean that it does not exist at all. It cannot be concluded from the tradition or the event that 'Ā'ishah or Fāṭimah wanted to exercise the right of the option of puberty but could not do so as the marriages were contracted at the instance of their fathers.

Second contention: The second argument of the jurists which is based on 'istiḥsān is that a father has perfect affection for his children; his guardianship, therefore, is also perfect. He is better suited to guard and take care of the rights and interests of his children than are the children themselves or any one else. As a father understands the interest and benefits of his children better than the children themselves because of his abundant love and solicitude for his children and on the basis of his exercising perfect guardianship over them, it will, as a result, follow that a father or grandfather gets the children contracted into marriage keeping all their privileges, interests and rights in view. Therefore, the marriages got contracted by them (father or grandfather) ought to be made binding and so effective that it cannot be repudiated by the exercise of the option of puberty.⁴

Criticism: The above argument that the marriage got contracted by the father or grandfather has been made irrevocable due to their abundant regard for their children and the marriage contracted by other guardians has been made liable to repudiation because of their lesser love is, to my mind, unsound due to two reasons: Firstly there is no religious basis for such discrimination (though there is some natural basis), and secondly the father and grandfather have as complete a love for their major daughters as they have for minors. If they on their own account get their major daughters contracted into marriage why should it be held, as is done, to be ineffective? Contrary to this, it is generally found as the age of a girl advances and she steps into the stage of womanhood the father becomes more cautious and careful for his daughter and his love for her increases.

In fact, the argument of the jurists that the father (or grandfather in his place) has greater love than the other guardians for the minor, and his guardianship is perfect hence the minor cannot be given the option of

⁴Al-Sarakhsi : *Al-Mabsūṭ*, Cairo, vol. iv, p. 215 :

“فلا اعتبار وجود الأصل الشفقة نفذنا العقد ولا اعتبار نقصان الشفقة أثبتنا الخيار”

puberty, has no religious basis. The argument depends on pure rationalisation and presumption based on human nature and experience of the time. It is possible that Abu Ḥanīfah and his contemporaries in the light of their experiences were of the view that a father would never act against the interests of his minor children. If, however, in the light of the prevailing conditions the legislature of a country at any time comes to the conclusion that honesty and trust have become a rarity and people are using their discretion wrongly and improperly, its thinking shall then be different from what Abū Ḥanīfah and his contemporaries had in their own time. In England till 1883 a father could freely sell his children. Legal restraints were therefore imposed. In a part of our own country, North West Frontier Province of Pakistan, such instances are not rare where a father gives his daughter in marriage after realising money from his prospective son-in-law, which, in fact, is a form of sale.

The great jurists themselves were not ignorant of such possibilities. In the books of *fiqh*, therefore, a number of conditions as incumbent have been laid down so as to make irrevocable the marriage of a minor girl got contracted by her father or grandfather. For example, the father or grandfather, as the case be, should not be untrustworthy in pecuniary matters and must not be a debauch (*fāsiq*) and negligent. The person with whom the marriage is got contracted should not be a disorderly person, a beggar or a profligate or of some mean profession or if there arise such conditions or things which are injurious for the minors, the minors, shall have the option of puberty. There is a unanimity between Abū Ḥanīfah, and the Ṣāḥibayn on this point, as noted in *Radd al-Muḥtār*.⁵ It is also reported in *Al-Ashbāh wal Nazā'ir* of Ḥamawī by Burjandi that in case of gross raw deal by father or grandfather the minors do have the option of puberty. In *Fath al-Mu'īn* it is laid down, "If the minors are got married by the father or grandfather, they shall not have the "option of puberty" except when the marriages have been contracted with social unequals (*ghayr Kufw*) or there be a case of gross raw deal. In such cases the minors after attaining puberty shall have the right to repudiate their marriages.⁶

Thus, it is laid down in the books of *fiqh* that the "option of puberty" is exercisable in case of marriage got contracted by a guardian other than the father or grandfather and in such cases the minors are entitled to annul their marriages without assigning any reason no sooner they attain their

⁵Ibn al-ʿĀbidīn : *Radd al-Muḥtār*, Cairo, vol. ii, p. 312-13; Ibn al-Nujaym: *al-Baḥr al-Rāʾiq*, Chapter on *Kafāʾat*, Cairo, vol. iii, p. 133.

⁶Mulla Muskin: *Fath al-Mu'īn*, on the margin of *Sharh Kanz al-Daqāʾiq*, part ii, p. 35.

majority. But if the marriage has been contracted under the guardianship of the father or grandfather it can only be annulled on the grounds of inequality in social status, inadequacy of dower and gross raw deal. In other words, the minors have absolute and unconditional right of annulling, by their exercise of option of puberty, the marriages got contracted by their guardians other than their father or grandfather, whereas the right of annulling the marriages got contracted by the father or grandfather is restricted and conditional. The right of "option of puberty" accrues when the father or grandfather acts in the marriages of minors with deception and negligence, such as a minor girl is got married with a mad man or a minor boy is got married with a prostitute or a dancing girl or the marriage is on the face of it, injurious to the interest of the minor; such as on account of difference in religion, the minor girl takes the marriage contract injurious to her religious beliefs.⁷ There is however no clear manifestation for such distinctions in the Holy Qur'ān, traditions of the Prophet or his Companions that there is no option of puberty in cases where the marriages of minors have been brought about by their fathers or grandfathers.

Another contention: Al-Sarakhsī in his noted book, "*Al-Mabsūṭ*," advances, on the basis of a tradition, one more argument of non-entitlement to the right of "option of puberty" in marriages got contracted by fathers or grandfathers. The tradition is about 'Ā'ishah who was got contracted by her father into marriage with the Prophet in her tender age. Had she been entitled to option of puberty inspite of her being contracted into marriage by her father, Abū Bakr, the Prophet must have informed her that she had the right of "option of puberty". In a parallel case that arose on the revelation of the verse, "I will provide for your enjoyment and set you free in a handsome manner,"⁸ he said to Aishah, "I place a matter before you, do not say anything to me about it till you have consulted your father on it." After speaking this, the Prophet read out the verses (xxxiii : 28, 29) 'Ā'ishah.⁹ The event related to the demand of the wives of the Prophet for better living. In this connection the following verses were revealed to

⁷Ibn al-Ābdin : *Radd al-Muḥtār*, Cairo, 1324, A.H. vol. ii, p. 418-419; Ballie : *Digest of Mohammadan Law*, Lahore, p. 50; Amīr Ali, *Muhammadan Law*, Lahore, V Ed., vol. ii, p. 370; *Aziz Bano v. Mahammad Ibrahim*, (1925) 47 Allahabad 823-838.

⁸Al-Qur'an, surah Al-Ahzāb : xxiii : 28.

⁹Al-Sarakhsī : op. cit. p. 212 :

"اننى اعرض عليك امراً فلا تحدثنى فيه شيئاً حتى تستشيرى ابويك ثم تلا عليها قوله تعالى (الخ)"

the Prophet who read them out to his wives and gave them the option of separation if they so desired. The verses are:—

“O’ Prophet ! say to thy consorts : If it be that ye desire the life of this world, and its glitter, then come ! I will provide your enjoyment and set you free in a handsome manner. But if ye seek Allāh and His Apostle, and the Home of the Hereafter, verily Allah has prepared for the well-doers amongst you a great reward.” (xxxiii : 28, 29).

The wives of the Prophet were then all content and consoled.

On similar ground it is argued by Sarakhsī that when ‘Ā’ishah was, on attaining puberty for the first time, sent to the Prophet he did not, before consummation, inform her of her option of puberty; it established a precedent that if a minor is contracted into marriage by a father there accrues no such option. Sarakhsī further writes, “This precedent is also referred to by Qāḍī Shurayh as well as by Ibrāhīm Nakh’ī. Ibn Simā’ah here resorts to *Qiyās* and *Istihsan* and asserts that “*Qiyās* demands that a minor after attaining puberty should have the right of annulling the marriage got contracted by the father as one has the option of puberty in a marriage got contracted by the brother. But we forego *Qiyās* on account of precedent (*Sunnat*) of the Prophet.”¹⁰ To my mind, the argument of Sarakhsī is flimsy. The Qur’ānic verse of giving option to the Prophet’s wives (*āyat takhyīr*) had been revealed because of the incident that the wives of the Prophet at that time were in penury and they demanded increase in their maintenance. In such a situation some religious directive was necessary. Hence, the verses were revealed. If that incident had not occurred, probably no revelation was necessary. The marriage of ‘Ā’ishah was got contracted in her tender age and thereafter her going to the Prophet had no special significance but was a normal event. The matter could have been significant if after marriage ‘Ā’ishah would have declined to go (to her husband’s place) on the ground that her marriage contracted by her father was not to her liking and that she would not like to go to her husband. In such event the revelation would have been necessary. And the Prophet, then, would have informed ‘Ā’ishah of the manifest or hidden revelation to the effect that the marriage was got contracted by her father, and that in the marriage got contracted by the father there was no “option of puberty”. But the case here was different. Further, the right of “demand of separation” was a religious direction in consequence of the said verse of *Takhyīr*. It was the duty of the Prophet to convey it to his wives. The Prophet, therefore, in performance of his duty informed ‘Ā’ishah and his other wives of the right of “option of separation”, (*Khiyār al-tafrīq*). Had there been a bidding for

¹⁰Ibid.

non-annulment of the marriage got contracted by the father or had there been a suggestion of the right of annulment of the marriage got contracted by the guardian during one's minority, the prophet would not have maintained silence. Rather, he would have expressed it with the same clarity as he did express after the verse of "*Takhyīr*". In fact, the system of contracting marriage during childhood (minority) based on pre-Islamic custom remained prevalent in Arabia as of yore. Nothing new happened in this connection of which the Prophet would have spoken to 'Ā'ishah so that it would have become known from his traditions. It may be said with full authority that the Holy Qur'ān is silent with respect to option of puberty. So far as my research goes there are no authorities, except one or two statements of Shi'ah narrators reported from Abu Ja'far¹¹ and one lonely tradition of the Prophet cited by Bayhaqī,^{11a} for the proposition that a minor has the option to annul his marriage after attaining the age of majority. Indeed, if a guardian gets an adult virgin contracted into marriage without her consent (though he may be a father or grandfather) she has the right of not accepting such a marriage contract and of holding it to be void. Traditions about this matter have been cited by Bayhaqī in *Al-Sunan Al-Kubrā*. These traditions, have already been mentioned in detail under Section 10, (Competency for marriage), *supra*. To my knowledge there are no traditions of the Prophet or reports from the Companions to establish the distinction that a minor girl, if contracted into marriage by a guardian, has no ground to exercise her option of puberty because the guardian is the father or grandfather and does have such a ground because the guardian stands in any other relationship to her.

Conclusion :

Thus, the traditions that are available do not specify with certainty that the marriages of those girls to whom the Prophet had given the permission of annulling their marriages were contracted into marriages during the periods of their minority. The traditions and the jurists have on the other hand by classification and reference to context placed their marriages under the headings of "marriages of virgin" and "marriages of women not virgin". This arrangement confuses the issue, whether the said marriages were contracted during their periods of minority. Presumably the said marriage contracts were of major girls who were married off by their fathers without obtaining their consent. Bayhaqī, however, mentions a tradition under the heading "Marriage of an

¹¹Al-Ṭūsī, Muhammad b. al-Hasan (d. 460 A.H.) : *Al-Istibṣār*, Najaf, Part iii, Chapter 145, p. 236-39.

^{11a}. See p. 480, footnote 17, *infra*.

orphan girl", which relates to the option of puberty.^{11b} One may therefore, conclude that similar to a major virgin, married off by her father or grandfather as guardian but without her consent, who on that account has every right to repudiate that marriage, a minor too contracted into marriage by a guardian can exercise her option of annulment on reaching puberty even if the guardian were her father or grandfather.

As against the view an objection may be raised that a virgin who is major is possessed of the right of giving her consent and is master of her will. Hence, without her giving consent, the consenting of any guardian (be the father or the grandfather) to her marriage shall not have that value which it would have had during the period of her minority. During minority, therefore, the consent of the father or the grandfather is of the same value as that of a virgin who is major. As against this, after she becomes major, she is herself possessed of the right of giving consent. Consequently, the consent of guardian on her behalf is imperfect. Marriage contract during minority has to be made through perfect consent. On this basis the marriage got contracted by the consent of father or grandfather, as the minor is incapable of exercising her will, is itself with a perfect consent and thus not liable to be annulled after attaining puberty; whereas marriage of a major virgin, because of being contracted through imperfect consent, shall be liable to be annulled.

The objection though appears to be weighty but is, in fact, superficial. The question calling for decision depends entirely on the girl's "acceptance and consent" and let it be so examined. The marriage of a minor got contracted by a guardian is a valid and affective contract with all its legal incidents and consequences. Similarly a major virgin's marriage got contracted by her guardian without her consent is again a valid contract. The operation of this latter valid contract, however, remains suspended and depends on the acceptance and consent of the major virgin. If she consents or accepts it, it becomes operative; otherwise it terminates and becomes void. The suspension of operation and its operativeness on mere acceptance spell out its original validity. The similarity of a guardian's power here also with the powers of a minor girl's guardian is quite manifest. The *nikāh* got contracted by both is *ab initio* valid. The difference is that repudiation or element of non-acceptance is a right of a major virgin which accrues at once as she is a major. But to a minor it accrues the moment she attains puberty. The relationship of the guardian to the girl should therefore be irrelevant in both cases on the basis of non-acceptance, whoever the guardian was. A minor has her will as a personal adjunct whether its exercise be deferred to puberty. This exercise of right after attaining puberty should be on par

^{11b}. Ibid.

with that of a major virgin's right. To conclude, the marriage got contracted during minority of a girl can be got annulled irrespective of the fact that the guardian was the father or grandfather.

Indo-Pakistan Law :

In undivided India till March 17, 1939 the marriages contracted by the father or the grandfather as guardian could not be got annulled by the exercise of "option of puberty". But under the "Dissolution of Muslim Marriages Act (VIII of 1939)" provisions of Muslim Law relating to suit for dissolution of marriages by women married under Muslim Law were consolidated and clarified. The wives got contracted into marriages by their fathers and grandfathers or other guardians were treated at par and declared entitled under section 2 sub-section 7 to obtain decrees for dissolution of marriages from Courts through their exercise of option of puberty. In the result, whatever distinction in connection with the right of "option of puberty" in marriages got contracted by fathers, grandfathers and other guardians had been recognised in the earlier decisions of the Indo-Pakistan Courts disappeared by virtue of this Act which is being fully implemented since then.

Furthermore, in Pakistan, the desired dissolution of marriage by the exercise of option of puberty has to be notified to the chairman of Union Council and got confirmed by it. (See Sections 7 and 8 of Muslim Family Laws Ordinance, 1961.

Thus, under the law of Pakistan too, a person contracted in marriage by his guardian during minority has an option on attaining puberty, either to abide by the marriage or to cancel it. (PLD 1956 Lah. 712=PIR 1953 Lah. 332=8 DLR W. P. 77).

Section 124. If a minor boy or girl is got married by a competent guardian during minority, they are on attaining majority entitled to exercise their option of puberty and to get thereby a decree of dissolution of their marriage through a competent Court of Law.

COMMENTARY

The most important question with regard to the option of puberty is whether the marriage stands dissolved by the mere exercise of the option of puberty by the minor on attaining puberty, or it gets dissolved by obtaining a proper decree from a competent Court of Law.

Classical View :

The Muslim jurists of great antiquity are unanimous on the point that the dissolution of marriage is not effected by the exercise of the option of puberty alone. A decree, to that effect, of a proper court has got to be obtained. In other words, by mere exercise of the option of puberty by either the husband or the wife, the marriage is not dissolved; it subsists till a proper court passes a decree dissolving the marriage. It follows, therefore, that if the wife even after exercising the option of puberty, allows consummation it would not constitute adultery. The cohabitation would be perfectly legal, in as much as the marriage subsisted. Likewise, after the exercise of the option of puberty and before the obtaining of court's decree, if the husband or the wife dies, the surviving spouse would inherit from the deceased. The views of some of the eminent Muslim jurists, to illustrate the point, are given hereunder :—

Qāḍī Khān : Qāḍī Khān, an eminent jurist and Qāḍī of Damascus during the fifth century of Hijra and the author of *Fatāwa al-Qāḍī Khān*, a highly authentic book on Ḥanafi *fiqh*, is of the opinion that by the exercise of the option of puberty, *de jure* separation between the couple is not effected and the marriage is not dissolved until their marriage contract is annulled by a Qāḍī. If the dissolution is effected before cohabitation, the entire dower will lapse, whether the dissolution is effected at the instance of the husband or the wife. If, however, the dissolution is effected after cohabitation the dower shall not lapse.¹²

Damād Āfandī : Damād Āfandī, the author of *Majma' al-Anhur*, discussing the "option of puberty" has written that the decision of a Qāḍī is a condition precedent to the dissolution of marriage through the exercise of option of puberty either by the husband or by the wife. The marriage is not annulled until a Qāḍī gives his decision thereon. The marriage contract being operative on both, its repudiation by one party alone would not get the marriage contract annulled in as much as it affects the rights of the other party as well. In the event of the husband being absent, the marriage contract cannot be dissolved because the decision of a Qāḍī is not binding on an absentee. The Court's decree is also necessary in case of separation. Hence, whoever of the spouses dies before the Court's decree the other will be his heir, because marriage contract being valid, the right

¹²Qāḍī Khan : *Fatāwā*, Delhi, Kitāb al-Nikāh, vol. i, p. 166 :

”وفى خيار البلوغ لا يقع الفرقة ولا يبطل النكاح ما لم يفسخ القاضى العقد بينهما فان كان ذلك قبل الدخول يسقط كل المهر سواء كان ذلك من قبل الرجل او من قبل المرأة وبعد الدخول لا يسقط شي من المهر“

of inheritance is established. In the event of the death of either of the spouses the marriage contract automatically concludes, whether his or her death has occurred before attaining majority. As the separation between them cannot be effected except by the decree of a Qāḍī, they shall be heirs to each other and the entire dower of the woman shall become due on the man, even if he dies before cohabitation.¹³

Ibn al-Humām : Shaykh Ibn al-Humām, the author of *Fath al-Qadīr*, a most renowned and authentic commentary on *Al-Hidayah* of Burhān al-Dīn al-Marghīnānī, is also of the opinion that if one of the couple dies after repudiating the marriage but without obtaining the Qāḍī's decree thereon, the one surviving shall inherit from the deceased.¹⁴

Al-Sarakhsī : Shams al-Dīn Al-Sarakhsī, (d. 483 A.H.) also known as Shams al-A'imma in his noted book, *Al-Mabsūt*,¹⁵ discussing the question of the option of puberty, writes that the option of puberty is converse of the "option of divorce" (*kḥayār al-ṭalāq*). Under the delegated power of divorce, the delegatee (wife) can effect separation without the decree of a court. The reason being that in the matter of divorcing herself she acts as a delegatee of her husband. She becomes empowered as principal, on the basis of the delegated power of divorcing herself. Therefore, as the husband has, without the decree of the court the right of divorcing his wife, in the same manner the wife has, after the right to divorce herself has been delegated to her by her husband, the right of divorcing herself in the capacity of her husband's delegatee. In its consequence that divorce shall have the same effect as if the husband had himself divorced his wife.

¹³Damād Āfandī : *Majma'al-Anhur*, Cairo, Kitāb al-Nikāh, Chapter on "Guardians and Equals", vol. i, p. 337 :

”وشرط القضا لفسخ في خيار البلوغ“ من صغير او صغيرة فلا يبطل العقد مالم يقض به القاضي لأن هذا العقد كان نافذا فلا يبطل بمجرد الرد..... فكان الرد ابطالا لحق الآخر فلا يتفرد به وفيه اشارة الى انه لا يصح الفسخ بغية الزوج والالزم القضاء على الغائب وكذا في فرقه تحتاج الى القضاء..... ورثه الآخر بلغا أولا لان النكاح صحيح الملك به ثابت فاذا مات احدهما فقد انتهى النكاح سواء مات قبل البلوغ او بعد البلوغ لان الفرقة بينهما لا تقع الا بقضاء القاضي فيتوارثان ويجب المهر كله وان مات قبل الدخول“

¹⁴Ibn al-Humām : *Fath al-Qadīr*, Commentary on *Al-Hidayah*, Cairo, vol. ii, p. 411 :

”ولو فسخ احدهما ولم يفسخ القاضي حتى مات ورثه الآخر“

¹⁵Al-Sarakhsī : Shams al-Dīn : *Mabsūt*, Cairo, vol. iv, Chapter on Marriages of Minor Boys and Girls, p. 212-27.

Similarly, Al-Sarakhsi comparing the option of puberty and the option of emancipation available to a freed slave girl, writes that the option of puberty is different from the option of emancipation, (Khiyār al 'itq), because the emancipated slave girl, when she becomes the master of her own person, can herself effect separation without the decree of the Court. The reason is that after manumission of the slave girl, the proprietary right of the husband would be more enhanced, because prior to the manumission the husband's right of revocation of divorce, if pronounced to her, was established by inference. Further, the husband could effect separation by pronouncing only two divorces, instead of three as in case of a free woman. The period of probation of the slave girls as well was two menses. But after her manumission the husband's proprietary rights on her would increase viz. the husband's right of having recourse to her would get established through the Qur'anic text, and he also would get the right of pronouncing three divorces. Hence, the wife, with a view to counter the increase in proprietary rights of her husband shall have the right to effect separation by the exercise of her option of emancipation, without the intervention of the Court. This because the increased proprietary right cannot be done away with unless the very basis (i.e. marriage) of proprietorship is dispensed with. Thus, the slave girl, on becoming *sui juris*, by the expression of her non-agreement does away with the very proprietorship (i.e. marriage). That is why the separation is effected without the intervention of the Court. As against this, in the "option of puberty" there is no increase in proprietorship of the rights of the husband over the wife. This is so because the slave-girl having no proprietorship right over her own person is without status whereas a minor girl on account of her minority is only restrained for the time being from exercising her rights on her own person. Al-Sarakhsi holds on the authority of Imām Muḥammad Shaybāni that if any minor (husband or wife) on attaining puberty exercises his or her right and separates, even then for want of order of dissolution by the Qāḍī the marriage subsists in essence. So much so that if one of them dies the survivor shall inherit from the other because death precedes separation. Al-Sarakhsi further proceeds on to say that even if a husband cohabits (after the exercise of the option of puberty) before the dissolution of marriage by a decree of a Qāḍī, the cohabitation would be legal, as the marriage still subsisted.

Conclusion :

Therefore, on the above authorities it can be safely held that if a minor girl, by exercising her option of puberty, declares her unwillingness to her marriage got contracted by her guardian and repudiates the same, the marriage is not dissolved by her mere repudiation; rather it subsists till

a decree of a proper court is obtained by her. If the husband cohabits with his wife after repudiation of marriage, but before the decree of the court, the act of his cohabitation shall be lawful. If before the decree of the court, one of the couple dies, they shall be heirs to each other and the entire dower of the wife shall be payable by and on behalf the husband.

Essentiality of Court's Decree :

In all some fourteen kinds of separations have been described by the jurists. Out of them, the first eight stated below are cases in which the court's decree is necessary and the rest are those in which no decree of the court is necessary.¹⁶ They are as detailed below:—

- (i) Separation on account of husband's male organ being amputated.
- (ii) Separation on account of husband being impotent.
- (iii) Separation on account of the exercise of the option of puberty.
- (iv) Separation on account of social inequality.
- (v) Separation on account of paucity of dower.
- (vi) Separation on account of husband's renouncing Islam.
- (vii) Separation on account of *li'ān*.
- (viii) Separation on account of husband's whereabouts being unknown for a certain period.
- (ix) Separation on account of wife's exercising the option of manumission.
- (x) Separation on account of *Ila*.
- (xi) Separation on account of apostasy. (The post-classical view, however, is that marriage is not automatically dissolved in the case of apostasy by a Muslim wife).
- (xii) Separation on account of the difference of *Dār* (Territory). That is, when husband leaves *Dār al-Islam* and takes permanent abode in *Dar al-Kufr*. (non-Islamic State).
- (xiii) Separation by wife's exercise of the delegated power of option of divorce.
- (xiv) Separation on account of the marriage contract being *fāsid* (irregular).

¹⁶Ibn-i-Nujaym : *Al-Bahr al-Rā'iq*, Cairo, vol. ii, p. 130; Ibn Humām : *Fath al-Qadir*, Cairo, 1356 A.H. vol. ii, p. 408, Ibn al-Ābidīn : *Radd al-Muḥtār*, Cairo, vol. ii, Chapter on Guardianship. 316-17,

The above classification includes "the dissolution of marriage by exercising the option of puberty" in the category of cases which require court's decree, for being effective.

Basis of the rule : The basis of the condition that has been laid down by the classical jurists for obtaining court's decree in the dissolution of marriage by exercising option of puberty is that the repudiation of marriage by the girl, on her attaining puberty, is inflicting injury to the husband, and it is not just and equitable that a valid contract merely by the repudiation of one party shall necessarily stand repudiated against the other party. It is therefore, essential that some third person should weigh and decide whether the right of option of puberty has been validly exercised at the proper time and that whether some such act has been committed by the party concerned which proves that the party after attaining puberty, either accepted the marriage contract or gave up his or her right of repudiation. It is evident that such matters can only be decided by a court. That is why it is necessary that after exercising the right of option of puberty a regular order of separation is obtained by making an application to a Court. Under law it is the court alone which can by its act impose an injury against the other.

Besides the above assertions of the classical Muslim jurists, it is found that Imām Sarakhsi has in his book *Al-Mabsūṭ*¹⁷ referred to a tradition reported by Ibn 'Umar. It states that Qudāmah b. Maẓ'ūn had married his niece, the daughter of Uḥmān b. Maẓ'ūn to Ibn 'Umar. It appears from the statement of Sarakhsi that the girl at the time of marriage was minor. She on attaining her puberty appeared before the Holy Prophet and expressed her disapproval of the said marriage. This tradition has been narrated by Bayhaqī in his book *al-Sunan al-Kubrā* thus :

"It is reported by Ibn 'Umar that Uḥmān b. Maẓ'ūn died and he left behind his daughter from Khawlah bt. 'Umayyah. He had appointed his brother Qudāmah b. Maẓ'ūn as his executor. Ibn 'Umar says that I sent to Qudāmah a proposal of my marriage with the said girl. He married her with me. After the marriage Mughīrah went to the mother of the girl and offered property to her. She was influenced by that offer and the girl, too, was favourably inclined towards accepting the wishes of her mother. The matter was taken up to the Holy Prophet. Qudāmah said, O' Prophet of Allāh ! this girl is the daughter of my deceased brother and he had appointed me the executor. I found Ibn 'Umar her equal (*kufw*) and keeping her welfare in view, I married her with Ibn 'Umar. The Prophet said, we will not marry her without her

¹⁷Al-Sarakhsi : op. cit. vol. iv, p. 215,

consent. Ibn' Umar says, she, then, was separated from me, although I had a right over her. Then they married her with Mughīrah.^{17a}

The same text of the tradition from another chain of narrators has been reported in this very book at page 121,¹⁸ with the following words added to the above version, "The Prophet then ordered him that she be separated and said "Don't marry *Yatama* until their permission is obtained."

Conclusion :

As it stands, it is not clear from the text of the above tradition that the girl was given in marriage during her minority and she desired, after attaining her puberty, that her marriage be dissolved. The context is, however, clear on the point that the girl was major at the time the matter was placed before the Prophet for his adjudication. If, as Sarakhshi asserts, the girl was married during her minority and the marriage was dissolved, on her exercise of the option of puberty, by the Prophet, the principle, then, becomes a sacred rule that there is need for a decree of the Court in matters of separation by exercise of the option of puberty and without that decree the marriage cannot be deemed to be dissolved. It may also be stated that Bayhaqī has discussed this tradition under the Chapter of "Marriages of Orphan-girls." The word "orphan" itself conveys the idea that she must be a minor at the time of nikāh, because the word orphan (*Yatamah*) is not generally used for a girl after her attaining puberty. Further, the appointment of executor (*waṣī*) for the girl is another proof of the minority of the girl.

Indeed, in an analysis of the problem, three questions have to be answered. The first is, whether a guardian can validly get his ward contracted in marriage? The second question is, whether such marriage gets

^{17a}*Al-Bayhaqī : Al-Sunan al-Kubra*, Hyderabad Deccan, vol. vii, Chapter on Marriages of Minors, p. 120 :

”عن نافع عن ابن عمر قال توفي عثمان ابن مظعون وترك ابنة له من خولة بنت حكيم بن امية واوصى الى اخيه قدامة بن مظعون وها خلاى فخطبت الى قدامة ابنة عثمان فزوجنها فدخل المغيرة الى امها فارغبها في الال فحطت اليه وحطت الجارية الى هوى امها حتى ارتفع امرها الى النبي صلى الله عليه وسلم، فقال قدامة يا رسول الله ابنة اتى واوصى بها النبي فزوجتها ابن عمر ولم اقصر بالصلاح والكفاة ولكنها امرأة وانها حطت الى هوى امها فقال رسول الله صلعم، هي بئيمة ولا ننكح الا باذنها فانزعزت منى والله بعد ان ملكتها فزوجوها المغيرة بن شعبة“

¹⁸*Ibid* : p. 121 :

”قامره النبي صلى الله عليه وسلم ان يفارقها و قال لا تنكحو اليتامى حتى تستامروهن“

effectively contracted or not? The third question is whether the marriage contract, in its effects and consequences from the very time of its being contracted, is perfect *inter vivos* or remains suspended till the attainment of the age of puberty? According to the consensus view of the jurists, the marriage of a minor got contracted by a competent guardian is valid and gets duly contracted and is perfect in its effects and consequences from its very inception and does not remain suspended. Then, the question arises whether a minor boy or a girl, has the right of repudiating the marriage by exercising the option of puberty? Under foregoing section the second question has been thoroughly examined to the effect that the minors, on their attaining puberty, have got the right of repudiating the marriage. Finally as to the third question, whether by merely exercising the right of option of puberty the marriage contract gets annulled or is it annulled after a court's order. The conclusion arrived at is that by mere exercise of the option of puberty the marriage contract cannot be held as annulled until the decision for its annulment is given by a competent Court. The option of puberty is a right, the expression or declaration of which is a personal right of a girl who has attained puberty, but as its exercise or declaration affects the other party as well, the obtaining of a court's decree is essential. The question here may arise whether a court can reject the wish of a girl? If not, how can the exercise of that right depend upon the decision of the court. The answer would be that the intent and purpose of a court's decision must be that the girl has validly exercised her right of option of puberty. The need of a court's decision is not primarily for the purpose of confirmation or cancellation of the right of the girl, but it is for the purposes of making it binding on the boy, the husband. If the act of the girls was effective on the person of the girl *exclusively* there was no need of a court's decree. The question involved is to make the wife's right effective as against the husband and deprive him of his marital rights which is not possible without the intervention of the court which has to determine whether the right was validly exercised.

Indo-Pakistan Law :

So far as the view of the courts of the Indo-Pakistan sub-continent is concerned there are different rulings respecting the annulment of marriage contracts by the exercise of the option of puberty. A study of these rulings will be of interest.

No decree was required to confirm the dissolution of marriage : In the case of *Mafizuddin versus Rahima Bibi*,¹⁹ the Calcutta High Court held that no decree was required under the Muhammadan Law to confirm the disso-

¹⁹A.I.R. 1934 Cal, 104.

lution of marriage that has been effected by the exercise of option of puberty, but to impress a judicial imprimature on that act, an order of a judge is necessary.

Contracting of another marriage amounts to repudiation of the first marriage : There is another case, *Shafiullah versus Emperor*²⁰, of the Allahabad High Court. The facts of the case were that a minor girl named Majidan was got contracted into marriages by her distant uncle, with a person named Taufail Ahmed. The girl on attaining puberty contracted her second marriage with another person named Inayatullah. The lower Court held Mst. Majidan guilty of bigamy under section 494 P. P. C. The High Court in its Revisional jurisdiction discussing the validity of the first marriage of *Mst. Majidan* and its annulment by her exercise of the right of the option of puberty stated that even if it is accepted, that the marriage of *Mst. Majidan* with *Tufail Ahmed* was valid, when she contracted another marriage on her attaining puberty with another person, "there could be no surer repudiation than the girl, of her own accord on attaining puberty, married someone other than the one that she was married when she was a minor," the Judge observed.

Decree of the Court essential : In respect of the annulment of marriage by exercise of the option of puberty there is a case of *Osman versus Budhu*²¹ decided by a Division Bench of the then Sind Chief Court. In this case the accused was charged with bigamy. It was, *Inter alia*, argued on behalf of the applicant that there was no valid subsisting marriage in this case because the young woman who had been given in marriage by her father before she had attained the age of puberty, had since repudiated this marriage, firstly by a written notice and secondly by the second marriage which was the subject of the alleged offence. The learned Judges, dismissing the Revision Application of the accused held, "It would appear that until she has obtained decree that the marriage has been dissolved, the marriage is subsisting."

Confirmation by Court essential : In a case of *Pir Mohammad versus State* the High Court of Madhya Pardesh, India²² held that "the mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation is required to be confirmed by the Court."

Court's order not essential : In Pakistan, Justice S. A. Rahman as a Judge of Lahore High Court (later Chief Justice of Pakistan) on the question

²⁰A.I.R. 1934 All. 589.

²¹A.I.R. 1942 Sind 92.

²²A.I.R. 1960 M.P. 24.

of the option of puberty, in the case of *Mohammad Bakhsh versus Crown*²³ held that the Court's order was not essential for validating the exercise of the option of puberty. In this case, a Sunni Hanafi girl *Amīran* was got contracted into marriage during her minority by her parents to a person named *Muhammad Bakhsh*. The girl, on attaining puberty got herself contracted into marriage with another man, *Allah Bakhsh*. *Mohammad Bakhsh* filed a complaint against *Mst. Amiran* under section 494 P.P.C. The Magistrate, on the ground that the girl had the right of option of puberty which she exercised and thereafter married *Allah Bakhsh*, held that the action of the accused was beyond the scope of Section 494 of the Pakistan Penal Code. The complainant *Mohammad Bakhsh* filed a revision in the Sessions Court. The Judge referred the matter to the High Court with a recommendation that the accused was guilty under Section 494 P. P. C. On behalf of the Applicant it was urged that the exercise of option to avoid a marriage, must be confirmed by an order of the Court and that the marriage continued to be in force until such confirmation. The Hon'ble Judge of the High Court discussing the facts in the case observed :—

“On principle, I can see no valid reason why the option of puberty, if once exercised under the conditions laid down by Muslim Law, should be subject to confirmation by an order of the Court. It is, after all, the right of an individual dependent entirely on personal choice. It is not conditioned by any consideration, as to whether the guardian for the marriage acted wisely or not, in selecting the spouse. I have been unable to find any authority to the effect that a court can refuse to confirm the valid exercise of such option. There is nothing in the Holy Qur'an or in any authentic collection of *Aḥādīth* to support the view adopted by some jurists of Islam that an order of *Qāḍī* is necessary to confirm an exercise of the option of puberty.”

Mr. Justice S. A. Rahman also quoted the following text of *Hedayah* at page 207 of the report :—

“(In this option of puberty) the *Qāḍī*'s order is a condition, as against the option (of emancipation) by the female slave, for the cancellation by it (option of puberty) is for removal of a latent injury and that is the possibility of a failing (on the part of the guardian) and for the reason it includes the cases of the male-female. In this there is made an accusation against another, (i. e., the guardian) and therefore it is dependent on the *Qāḍī*'s order : whereas the option of emancipation is for the removal

²³P.L.D. 1950 Lah. 203.

of a patent injury and that is the right of ownership over her. For this reason it (the option of emancipation) is confirmed to the female, the removal (of this injury) is the consideration; and such removal does not depend on the Qazi's order."

Commenting on the above passage, Mr. Justice S. A. Rahman, observed, "It is difficult to appreciate the reason for this distinction drawn by the author of the Hedayah between the right of option after manumission and the right of option of puberty.....In essence there seems to be no distinction between the two kinds of cases as in either case, the person concerned is entitled to relieve himself or herself from evil."

The learned Judge, at the end, with reference to the Mohammadan Law by Syed Amir Ali, quoted *Radd al-Muhtār* to the effect that "the condition relative to the decree of the Judge is required for the purpose of confirmation of the cancellation (and) not for establishing the power (ikhtiyar) (to cancel the marriage). He further observed that "the better view, therefore, seems to be that the court's order is not essential for imparting validity to the exercise of the option of puberty." Consequently the learned Judge held that "in the present case, on the facts I find that the first marriage of the minor girl had never been consummated and that she repudiated that marriage on attaining puberty within the period allowed by law, to the knowledge of her husband. I would, therefore, hold that the option of puberty was validly exercised and the first marriage could not be deemed to subsist at the time of her second marriage for the purposes of Section 494 Penal Code." (See "Criticism" p. 488 *infra*).

Mere denial of marriage amounts to repudiation : Justice Badiuzzaman Kaikhus of the Lahore High Court, as he then was, in the case of *Allauddin versus Farkhanda Akhtar*²⁴ held, "In certain circumstances mere denial of marriage may amount to its repudiation. The only question is whether she is prepared to accept him as a husband or not, and if she unequivocally says, she is not, the option of puberty is exercised." In this case, the plaintiff Farkhanda Akhtar filed a suit in a civil court against the defendant Allauddin praying for a declaration that there was no marriage subsisting between the plaintiff and the defendant. In the alternative, it was prayed that the court be pleased to award a decree for the dissolution of marriage, if existing, on the ground that at the time of the alleged marriage she was a minor and that, on attaining puberty, she repudiated the marriage.

No aid of the Court is required : In another case of the Lahore High Court one *Mst. Muni versus Habib Khan*,²⁵ the former filed a suit against

²⁴P.L.D. 1953 Lah. 131.

²⁵P.L.D. 1956 Lah. 403.

her husband Habib Khan for a declaration that her marriage with the defendant, performed during her minority by her maternal aunt, stood terminated by her repudiation on her attaining puberty. Justice B. Z. Kaikaus, in the case held, "such repudiation puts an end to the marriage without the aid of any court and when the matter comes to court, the court does not dissolve the marriage by its own act but recognises the termination of the marriage."

Repudiation automatically annuls the marriage: In a Peshawar case, *Mst. Sarwar Jan versus Abdul Majid*,²⁶ a learned Judge observed that one of the most important principles is that a minor girl contracted in marriage retains the option upto the age of 18 years until she expresses her consent or disprobation in express terms. In other words, the right of annulment continues until she expressly ratifies it, say by express words or by cohabiting with the husband, or by asking for her dower or maintenance.

About several modes of withholding assent, the learned judge observed, "the withholding of assent may be expressed in a variety of ways. It may be indicated by the fact that without having recourse to institution of suit for the dissolution of marriage the girl may, where there has been no consummation and provided also that she is not more than 18 years, get remarried. It may be indicated by serving a notice on the husband through an attorney or publishing a notice in a Newspaper that the option of puberty has been exercised. It may be manifested by the mere institution of a suit for dissolution of marriage which may eventually be dismissed in default under order IX, Rule 3 C. P. C. In the instant case there is the categorical averment in the plaint that the option of puberty has been exercised. That in my view is an unequivocal expression of renunciation of the marriage." The learned Judge, held, "It follows that by instituting the previous suit which was dismissed in default the marriage of the plaintiff with the respondent stood automatically annulled, in that it is common ground between the parties and there is concurrent finding of the courts that the marriage has not been consummated and that she was below 18 years of age at the time of instituting the first suit." The same judge in another case *Abdul Sattar versus Wakila Bibi*²⁷ was, more or less of the same view, as expressed by him in the earlier decision.

Option of puberty, marriage before age of puberty may be dissolved by women repudiating it before age of 18: The repudiation of marriage by the woman who was married during her infancy is subject only to two conditions: firstly that she repudiates the marriage before attaining

²⁶P.L.D. 1965 Pesh. 5.

²⁷P.L.D. 1965 Pesh. 1.

the age of eighteen years and secondly the marriage has not been consummated. The statute does not prescribe any particular form or procedure for repudiation of marriage; it may be by oral word or, even by conduct signifying rejection of marriage. The essence of the matter is the actual repudiation of marriage before attaining the age of 18 years by the woman. Till then the marriage remains inchoate, as it were, liable to dissolution by unilateral repudiation of the woman. In other words, the fate of the marriage hangs by the slender thread of unilateral option to be exercised by her before attaining the age of eighteen years. Once it is exercised the marriage stands dissolved. It is true that repudiation of marriage must be established like any other fact. Where repeated efforts for the *rukhsati* of the woman were made but the same could not come off because of her refusing to go and live with her husband, it was held that this conduct on the part of the woman furnished strong circumstantial corroboration of the repudiation of marriage. PLD 1969 Lah. 448—PLR 1969 Lah. 108—21 DLR (W.P.) 115—PLR 1970 (1) W.P. 743.

Conditions for the exercise of option of puberty : There are three pre-conditions for exercising option of puberty, namely, the performance of marriage during minority with the consent of the guardian, its non-consummation, and its repudiation between the age of 16/18 years. (PLD 1970 Lah. 475.)

Option of puberty exercised by woman, no decree of Court necessary to make it effective, woman free to marry immediately after repudiating first marriage : Having once repudiated the marriage by a proper exercise of option of puberty a Muslim woman is under no obligation to wait for the decree of the Court for contracting a second marriage and instances are not wanting where before the matter has come up before the Court the woman has already gone in for a second marriage and has even borne children in the subsequent wedlock as is stated to have happened in the instant case. (PLD 1970 Lah. 475.)

According to Muslim Law, there is an automatic severance of the matrimonial relationship when the girl exercises the option of puberty. It is not necessary that in order to give legal force to repudiation of marriage, a decree should be obtained from a civil Court. (1970 P. Cr. L J 166 Lah.).

Decree of Court. A decree of Court is not essential for imparting validity to the exercise of the option of puberty. [PLD 1970 Lah. 475—1970 P. Cr. L.J. 166 (Lah.)—PLD 1950 Lah. 203—PLR 1950 Lah. 227—PLD 1956 Lah. 403—PLR 1956 Lah. 461—8 DLR W.P. 25]. However, a declaration can be given by the Court itself even in the court of Criminal proceedings initiated under section 494, Pakistan Penal Code to the effect that the first marriage stands dissolved by the option of puberty having been exercised,

(PLD 1950 Lah. 203—PLR 1950 Lah. 227). It is to be noted in this context that no period of limitation is prescribed for obtaining the decree of the Court on the ground of exercise of option of puberty. (PLD 1965 Pesh. 5; 17 DLR W. P. 76).

Criticism :

Of the aforesaid decisions of Indo-Pakistan courts, the observation of the Calcutta High Court in its decision that there is no necessity for a court's decree for confirmation of the dissolution of marriage by exercise of option of puberty is not in agreement with the consensus opinion of Muslim jurists, which is supported by the aforementioned tradition. Apart from this, under Section 2 (vii) of the *Dissolution of Muslim Women's Marriage Act, 1939* a Court's decree is essential in the case of dissolution of marriage by the exercise of the option of puberty. The Allahabad High Court held that on attaining majority, contracting marriage with another person by the girl is in itself the best method of the dissolution of the first marriage. It shows that for the dissolution of marriage contract, by exercise of the option of puberty, a Court's decree is not essential which, in the light of the above discussion, appears to be based on wrong conception. Indeed the decision of Sind Chief Court referred earlier is in accordance with the *fiqh*.

The decision of Lahore High Court in the case of *Mohammad Bakhsh versus Crown* to the effect that the first marriage contract of the girl, on account of her exercising the option of puberty was not in existence at the time of her entering into second marriage contract appears to be misconceived, specially where a court's decree has not been obtained. The observations of Mr. Justice S. A. Rahman that he was unable to find any authority to the effect that a court could refuse to confirm the "valid exercise of such option" itself is a pointer to the fact that the option of puberty in that case was validly exercised, and obviously there could be no occasion for its refusal. The need for a decree on the point, however, could not be overemphasized, if the option was invalidly exercised, such as after the woman's attaining the age of 18 years or after consummation of marriage, as prescribed by Act, VIII of 1939 itself. Mere statement of the girl alone will not dissolve the marriage nor filing of suit can act as valid exercise of the option unless its conditions are declared to have been fulfilled.

The learned judge has further found it difficult to appreciate the reason for the distinction made between the propositions that, according to classical Muslim jurists, there was no need for Court's decree if the right of option to dissolve the marriage was exercised by a slave girl after manumission, whereas, it was necessarily required in case of option of puberty by a free woman. The reason of such distinction is that when a slave girl becomes free, an absolute change is wrought in her status. She is clothed with complete civil rights and becomes *sui juris*, as if a new legal person is

born. The slave girl, who had earlier been given into marriage by her Master, was no more in existence. The Muslim jurists have on this basis made the distinction between the two. The relevant discussion is available in *Al-Mabsut*, Imam Sarakhsi, Vol. IV, page 212-227.

The contention of the learned judge that there was nothing in any authentic collection of *aḥādīth* to support the view adopted by some Muslim jurists that an order of *Qōḍī* was necessary to confirm an exercise of the option of puberty, is well met by the *ḥadīth* in *Al-Sunan al-Kubrā* of Bayhaqi, Vol. VII, page 120/121 as above (see footnotes 17-A and 18 *supra*).

Similarly, the decision of West Pakistan High Court, Lahore Bench in the case of *Mst. Muni v. Habib Khan* that the repudiation of marriage by the exercise of option of puberty terminates the marriage contract, without the aid of the Court, contradicts the assertions of the *fuqāhā*. (Pl. *Faqih*. i.e. jurist).

The decision as reported in PLD 1969 Lahore p. 448, also seems to favour the view that the marriage automatically stands dissolved by mere unilateral exercise of the option of puberty, even by conduct. In the later case of 1970 it was specifically held that it was not necessary that the court's decree be obtained to give legal force to repudiation of marriage. Both these decisions are contrary to the unanimous view of the classical Muslim jurists.

It has to be clearly understood regarding the exercise of the option of puberty that the exercise of the option is intended to express and declare the intention of repudiating the marriage. It does not cause a dissolution of marriage by itself. A minor girl on attaining her puberty, has the right of expressing her disapproval to the marriage by exercising her option. The purpose of the court's decree, however, is to enforce that right of the girl, so that the claim of the wife against her husband be made effective and binding on him. The declaration or expression of the option of puberty merely proves the exercise of the right by her. It does not prove its enforcement on the husband and dissolution of the marriage contract. That is why a court's order for the dissolution of marriage is essential so that the right of the wife, through it, be made binding and effective on the husband in the form of a decree.

The Muslim jurists, who hold the view that a court's decree is necessary for the dissolution of marriage that has been effected through the exercise of the option of puberty, contend that wife's repudiation of marriage is an injury to the husband. It is not expedient that a contract of marriage, legally and validly brought into being, should become a nullity by either party's mere repudiation. It is incumbent that a court of law should

examine whether the option has been exercised in a proper manner and at the proper time and whether either of the parties has committed any act which bars the right of exercising such option. It is obvious that such matters can only be decided by a competent court of law. Hence, after exercising the right of option of puberty, the party concerned must apply to a proper court and obtain therefrom a decree of dissolution of marriage.

Conclusion :

On examining the conflicting views of Muslim jurists and of the Indo-Pakistan courts, it is apparent that according to Muslim jurists a minor girl, on attaining puberty, through the exercise of her right of option, is entitled to express her disapproval and to repudiate the said marriage. A court's decree is, however, essential to make the dissolution of marriage binding on her husband. The marriage, therefore, does not appear to stand dissolved by mere repudiation through the girl's exercise of the option of puberty. The dissolution does not take effect until a court of law confirms the repudiation. The option of puberty is a right granted to a minor on attaining puberty. The exercise of this right by one party to marriage effects the rights of the other party concerned. The necessity of court's intervention, thus, becomes obvious; and the question as to why the repudiation of marriage by one has been dependent on its being confirmed by the decree of a court, is thus answered. In this context, it is to be borne in mind that the effect of repudiation is not limited to the repudiator alone, it extends to the other party of the marriage as well. The decree of a court is essential to make the effect of repudiation of marriage binding on that other party too. Further, sub-section (vii) of section 2 of the Dissolution of Muslim Women's Marriage Act, 1939 lays down that :

“A woman under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage” on the ground “that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years; provided that the marriage has not been consummated.”

It confers a right which already existed in the Muslim Law, with some variance. It cannot, however, be said to be the intention of the Legislature that the exercise of the right tantamounts to the dissolution of marriage without the aid of the court and that mere exercise of that right makes the woman “free”. If that be so, the provision of the Act that the exercise of such right entitles her to obtain a decree for the dissolution of her marriage becomes almost redundant.

It is, therefore, difficult to resist the conclusion that the point of view of the classical Muslim jurists was not properly represented in the courts of law, and our courts lost their direction through their concentration upon the general principle to the exclusion of the others. Besides, it is also socially desirable that the dissolution of marriage in such a case should be judicially confirmed by a competent court beyond all doubt.

Section 125. A girl, in the event of her disapproving the marriage got contracted by her guardian during her minority, may exercise her right of option of puberty after her attaining puberty or of acquiring knowledge of the marriage or till completing her eighteenth year of age, whichever is later.

Period of exercising option of puberty

COMMENTARY

Great strictness as to the period of the exercise of option of puberty has been laid down in the books of *fiqh*. Hence, according to jurists, the minor girl, if she disapproves the marriage got contracted by her guardian, ought to exercise the option of puberty immediately on attaining puberty, provided she has knowledge of it. If the minor girl does not have the knowledge of the marriage contract at the time of her attaining puberty, her right of exercising option of puberty will not be effected merely because of her attaining the age of puberty.²⁸ Rather, she shall retain that right after obtaining the knowledge of her marriage contract, for a reasonable time for its exercise.

Option to be exercised promptly : According to the books of *fiqh*, in the event of the knowledge of the marriage contract, the exercise of option of puberty must be promptly just after attaining puberty; otherwise her silence will amount to her approval and her right of exercising the option of puberty shall lapse. The jurists have based it on the principle of implied consent of the girl in a marriage contract.

Indo-Pakistan Law :

Prior to Dissolution of Muslim Marriages Act, 1939 : When a girl has attained puberty before the age of sixteen, and she wants to repudiate the marriage before attaining the age of sixteen she cannot do so if she was contracted in marriage by her father or paternal grandfather unless father or grandfather had acted fraudulently or negligently. (AIR 1937 Rang 361—172 I. C. 448—47 All 823—89 I. C. 690—50 All 733—113 I. C. 434—97

²⁸Ibn al-Ābidīn : op. cit. p. 312-31; Al-Sarakhsī : op. cit. p. 212.

PLR 1915—28 I. C. 421). The father would be said to have acted fraudulently and negligently if the minor was married to a lunatic or the contract was to her manifest disadvantage. (AIR 1937 Rang 361—172 I. C. 448—47 All. 823—89 I. C. 690—50 All. 733—113 I. C. 434—97 PLR 1915—28 I. C. 421). Disparity of age is not manifest disadvantage, but if the prospective bridegroom were diseased, or of weak intellect and had some grave physical deformity, or if his worldly position was such that the change from father's house to that of the bridegroom would be one attended by material discomfort to her, all those factors might be taken into consideration. (AIR 1937 Rang 361—172 I. C. 448—47 All. 823—89 I. C. 690—50 All. 733—113 I. C. 434—97 PLR 1915—28 I. C. 421). When the character of the husband has serious blemishes the option exists. (AIR 1940 Sind 145—190 I. C. 94). A Shi'āh girl married to a Sunni husband may exercise option of puberty on grounds of conscience. (47 All. 823—89 I. C. 94).

After the enforcement of Act VIII of 1939 : After the girl has attained the age of sixteen, she can exercise her option of puberty under S. 2 of the Dissolution of Muslim Marriages Act, 1939. There are three pre-conditions for exercising option of puberty, namely, the performance of marriage during minority with the consent of the guardian, its non-consummation, and its repudiation between the age of 16/18 years (PLD 1970 Lah. 475). Before the Act a minor girl given in marriage by the father or the father's father had no option to repudiate it on the attainment of puberty but this has been changed.

Under Dissolution of Muslim Marriages Act : A minor girl, however, has been empowered under Section 2 (vii) of the Dissolution of Muslim Women's Marriage Act, 1939 to exercise her right of the option of puberty before her attaining the age of eighteen years.

The contract by father or father's father stands on no higher footing than that of any other guardian and the minor can repudiate or ratify the contract made on his or her behalf during the minority, after the attainment of puberty. (PLD 1962 A. J. & K. 7 (DB)—PLD 1949 Lah. 75—AIR 1950 Lah. 45—AIR 1950 Lah. 133—Pak L. R. 1950 Lah. 22)—51 Cr. L. Jour. 1169 (AIR 1942 Sind 92, Dissented from). This provision of law creates no new remedy. It gives under Cl. (vii) of S. 2 only a statutory recognition to the view which is more in accord with the present time out of the several conflicting views prevailing under different schools of Muslim Law. (PLR 1950 Lah. 227—AIR 1950 Lah. 133—51 Cr. L. Jour. 1169).

Presumption of puberty : In the absence of evidence to the contrary, a Muslim girl is presumed to have attained puberty at the age of sixteen.

But, it is a question of fact in each case and a girl may reach the puberty stage even earlier. (PLD 1952 Lah. 548—PLR 1951 Kar. 454—PLR 1952 Kar. 110). It would, therefore, necessarily follow that the minor should exercise the option after the age of 16 years unless there was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading. [PLD 1949 Lah. 75—AIR 1919 Cal. 84 (DB)]. It is to be noted that the plaintiff need not prove her exact age, but she must prove that she was given in marriage before she attained the age of sixteen and that she repudiated the marriage before attaining the age of eighteen. [(AIR 1947 Sind 102—ILR 1946 Kar. 246 (DB)].

When option may be exercised: Clause (vii) of S. 2 of Dissolution of Muslim Marriages Act adopts sixteen as the fixed age of puberty without an opportunity of rebuttal. This clause does not speak of puberty at all but only of an age though in fact it does deal with the option arising at puberty, and the only way in which it can reasonably be interpreted is that woman who has before the age of sixteen years been given away in marriage by her guardian is allowed to repudiate her marriage for a period of three years after she attains the age of sixteen and before she attains the age of eighteen. The clause eliminates the fight over proof of puberty. (PLD 1956 Lah. 712—PLR 1953 Lah. 332—8 DLR W. P. 77).

Age till when option may be exercised: A minor girl contracted in marriage retains the option of puberty up to the age of 18 years or until she expresses her consent or disapprobation in express terms. In other words, the right of annulment continues until she expressly ratifies the marriage say by express words or by cohabiting with the husband, or by asking for her dower or maintenance. [PLD 1965 (W.P.) Pesh. 5—17 PLD 1965 Pesh. 1—17 DLR W. P. 71]].

Age-limit for exercising option: Where a girl does not know of her marriage till she attains the age of eighteen the option of puberty may be exercised when she comes to know of the existence of her marriage and is prolonged to such time when she comes to know that she has a right to repudiate it. She can repudiate it within a reasonable time thereafter. (AIR 1916 Lah. 827—122 I. C. 481—AIR 1938 Lah. 719—178 I. C. 732). (In this case the age at the time of repudiation was more than 13—AIR 1938 Pat. 604—177 I. C. 514).

How option may be exercised: The law does not prescribe any particular form or procedure for repudiation of marriage, it may be by oral word or even by conduct signifying rejection of marriage. The essence of the matter is the actual repudiation of marriage before attaining the age of

18 years by the woman. Till then the marriage remains inchoate, as it were, liable to dissolution by unilateral repudiation by the woman, In other words the fate of the marriage hangs by the slender thread of unilateral option to be exercised by her before attaining the age of eighteen years. Once it is exercised, the marriage stands dissolved. [PLD 1969 Lah. 448—PLR 1969 Lah. 108—21 DLR (W.P.) 115—PLR 1970 (1) W. P. 743—PLD 1965 Pesh. 5—PLD 1965 Pesh. 1]. The withholding of consent may be expressed in a variety of ways. It may be indicated by the fact that without having recourse to institution of suit for the dissolution of marriage the girl may, where there has been no consummation and provided also that she is not more than 18 years old, get remarried. It may be indicated by serving a notice on the husband through an attorney or publishing a notice in a newspaper that the option of puberty has been exercised. It may be manifested by the mere institution of a suit for dissolution of marriage which may eventually be dismissed in default under Order IX, rule 3, C.P.C. [PLD 1965 (W. P.) Peshawar 5—17 DLR (W.P.) 76—PLD 1965 Pesh. 1—17 DLR W.P. 76]. Marrying some other man, on attaining puberty, is enough to constitute repudiation. [PLD 1970 Lah. 475—AIR 1934 All. 589—159 I. C. 138]. In certain circumstances even mere denial of marriage may amount to its repudiation. [PLD 1953 Lahore 131—PLR 1953 Lahore 34!]. Where repeated efforts for the *Rukhsati* of the woman were made but the same could not come off because of her refusing to go and live with her husband, it was held that this conduct on the part of the woman furnished strong circumstantial corroboration of the repudiation of marriage. [PLD 1969 Lah. 448—PLR 1969 Lah. 108—21 DLR (W.P.) 115—PLR 1970 (1) W. P. 743].

No form prescribed : For exercising the option of puberty no special form is essential. In certain circumstances even denial of marriage may amount to repudiation. The only question is whether on attaining puberty the man is prepared to accept the woman as his wife or the woman is prepared to accept the man as her husband, and if she unequivocally says that she is not prepared, it would be deemed that the option of puberty has been exercised.²⁹

Suggestion :

The fixing of the period for the exercise of the option of puberty is essential from juristic point of view. It has not been made explicit in Section 2 (vii) of the Dissolution of Muslim Woman's Marriage Act, 1939 what will happen if the knowledge of marriage contract is obtained after her attaining the age of eighteen years. Hence by a suitable amendment in the said Section it is necessary to make provision in respect of the knowledge of marriage contract, as codified above.

²⁹ *Alā al-Din v. Farkhunda Akhtar*, P.L.D. 1953, Lah. 131.

Section 126. The option of puberty of a virgin shall lapse, if she, inspite of the knowledge of her marriage contract, on attaining her puberty, permits her husband to cohabit with her or if she does, by commission or omission of an act, expressly or impliedly make it evident that she does not repudiate the marriage contract.

Explanation : The right of exercising the option of peberty by the wife shall not be affected if she has been subjected to intercourse by her husband during her minority without her consent or having knowledge of t he marriage contract.

COMMENTARY

Owing to the surrendering of her person by a wife to her husband, her right of repudiating the marriage contract by exercising the option of puberty lapses. As the wife gives control over her person to her husband through cohabitation, her right of exercising option of puberty similarly lapses.³⁰

Pakistan Law :

Acts during minority : In the case of *Ghulam Sakina v. Falak Sher*, Mr. Justice Muhammad Sharief of Lahore High Court (later on judge of the Supreme Court) observed "Anything done by the minor during the minority, would not destroy the right which could accrue only after puberty. The cohabitation of a minor girl would not thus put an end to the "option to repudiate the marriage after puberty".³¹

Consummation during minority : Anything done by the minor during minority, would not destroy the right which could accrue only after puberty. The cohabitation of minor girl would not thus put an end to the "option" to repudiate the marriage after puberty. The assent should come after puberty and not before, for the simple reason that the minor is incompetent to contract; nor should the fact that consummation has taken place without her consent take away the right to repudiate it. (PLD 1949 Lah. 75—PLD 1975 Lah. 651—PLR 1957, W. P. 1013—9 DLR W. P. 45—PLD 1952 Lah. 548—PLR 1951 Lah. 656—AIR 1950 Lah. 45). Even where consummation had taken place after the girl had attained the age of 16 and had not attained

³⁰Ibn al-Nujaym : op. cit. vol. iii, p. 130; Haskafī : 'Alā al-Din : *Durr al-Mukhtār* on margin of *Radd al-Muhtār*, Cairo, vol. ii, p. 317; Ibn al-Humām : *Fath al-Qadīr*, vol. ii, p. 399; Damād Āffandī ; op. cit. vol. i, p. 333-34.

³¹P.L.D. 1949, Lah. 75.

the age of eighteen, but it had taken place by force and not by consent, she can exercise the option of puberty before attaining the age of eighteen. [PLD 1962 A. J. & K. 7 (D.B.)]. If the wife is living with her husband when she arrives at puberty, her option is not determined unless she assents explicitly or by implication to the marriage. Nor is mere consummation sufficient. There must be consummation with the wife's consent. Moreover, all the necessary facts must be proved by the husband to the satisfaction of the Court. The Court leans in such cases in favour of the wife. [PLD 1965 (W.P.) Pesh. 1—17 DLR (W.P.) 71]. Consummation of marriage should be proved as a fact on consideration of the entire evidence of the case and the refusal of the woman to have herself medically examined by a lady doctor cannot be taken to be proof of consummation of marriage. (AIR 1950 Lah. 45).

Absence of knowledge : The same shall be the position in the event of not having knowledge of marriage because having no knowledge of it, the occasion or availability of exercising the right of option of puberty does not accrue.

Cohabitation without consent : The right of option of puberty of the girl not being affected in the event of cohabitation without her consent is in conformity with the general principles of equity.

Suggestion :

It is necessary that in the light of the above discussion suitable amendment be made in Section 2 (vii) of the Dissolution of Muslim Woman's Marriages Act, 1939, regarding consummation of marriage by force or fraud.

Section 127. The right of exercising the option of puberty of a boy or an unconsummated divorced or widowed girl (from her previous husband) does not lapse till he or she, on attaining the age of puberty, does not consent to the said marriage contract, either expressly or impliedly.

Option of puberty of boy or minor divorced or widowed girl

COMMENTARY

In Islamic law both boy and girl, on attaining the age of puberty, are entitled to repudiate their marriage got contracted by their guardians during their minority.

Distinction : There is, however, a distinction between them in the matter of the period within which they may exercise the right of such option. The jurists have, in the case of a girl, prescribed the time to be after just

attaining her puberty whereas in the case of a boy they have not prescribed any time-limit. Same is the case with a woman divorced or widowed during her minority. Thus, the right of exercising option of puberty of a boy and a widowed or a divorced woman does not lapse by their maintaining silence after attaining the age of puberty. Their right of the option of puberty is not lost until there is an express or implied consent by them.

Several examples of implied consent have been stated in the books of *fiqh*, e.g. paying dower to her, or kissing or embracing the wife by the boy after attaining his majority.³²

It is also stated in Baillie's Digest of Muhammadan Law (p. 52) that the option of a boy to repudiate his marriage continues till, after attaining puberty, he acquiesces in the marriage either expressly or impliedly.

Option of puberty of insane person :

It is further stated in Baillie's Digest (p. 54) that if an insane person is contracted in marriage by his guardian during his insanity and he exercises his option to dissolve the marriage on recovering his reason, it would have the same effect as repudiation by option of puberty.

Section 128. On confirmation of the exercise of the option of puberty by the Court, the marriage shall be treated as having never taken place.

Effect of confirmation of the option

COMMENTARY

It has already been observed that the marriage contracted during minority, by one's guardian subsists till it is repudiated by a valid exercise of the option of puberty and it is so confirmed by the Court (see Section 124 *supra*.)

Effect of the exercise of the option :

It has, however, been held in a Lahore case of pre-partition days that by the exercise of the option of puberty the marriage ceases to be a marriage and must be treated as having never taken place.³³

³²Ibn al-Ābidīn : *Radd al-Muhtār*, Cairo, 1324, vol. ii, p. 427 :
 ”وخيار الصغير والشيخ إذا بلغا لا يبطل بالسكوت (بلا صريح) رضا (أو دلالة) عليه (كقبلة ولمس) ودفع مهر (ولا) يبطل (بقيامها عن المجلس) لأن وقته العمر فيبقى حتى يوجد الرضا“

³³AIR 1938 Lah. 719; 178 I. C. 732.

CHAPTER XVI

Ila, Zihar and Li'an

Section 129. If the husband makes a vow that he would not have sexual intercourse with his wife for a period of four months (or more) and the period of four months thus expires, divorce shall get effected on the wife except when the husband, before the expiry of the period of four months, has recourse to the wife by words and, if possessing power, by acts.

COMMENTARY

The literal meaning of the word *Īlā'* is "to vow not to have sexual intercourse with one's wife". Consequently, if a person makes a vow that he shall not have sexual intercourse with his wife for a period of one or two months (but less than four months) it should be an "*Ila*" in its literal sense, but ineffective legally.¹ "*Īlā'*" shall be effective legally when a person makes a vow that he shall not have sexual intercourse with his wife for a period of *four months or more*.² It is a condition for "*Īlā'*" that it must be in the form of a vow. It shall not be "*Īlā'*" if a vow is not taken, it shall have no legal effect.³

Qur'anic Edict :

In connection with "*Ila*" God says in the Qur'ān, "For those who take on oath for abstention from their wives, a waiting for four months is ordained; If then they return, Allah is oft-forgiving, most merciful. But if their intention is firm for divorce, Allāh heareth and knoweth all things."⁴

¹Al-Shi'rānī : *Al-Mizān Al-Kubrā*, Cairo, vol. ii, p. 125.

²Ibn Rushd : *Bidāyat al-Mujtahid*, Cairo, 1379 A.H. vol. ii, p. 99 : Al-Jazārī, 'Abdur Rahman : *Kitab al-fiqh 'alal Madhāhib al-Arba'ah*, Cairo, 1355 A.H., vol. iv, p. 463.

"ان يحلف الرجل ان لا يطاع زوجة امامدة هي اكثر من اربعة اشهر او اربعة اشهر"

³Damād Āfandi d. (1088 A.H.) : *Majma' al-Anhur*, Cairo, 1327, A.H., vol. i, p. 442.

⁴Al-Qur'ān, surah Al-Baqarah, 11 : 226, 227.

"للذين يولون من نساء هم تربص اربعة اشهر وان عزوا الطلاق فان الله سميع عليم"

It means, if recourse is had within the period of four months, God is kind and merciful; if divorce is intended, God is all knowing. Thus, if one cohabits with his wife within the period of four months he has to atone for breaking his oath but the "Īlā'" shall lapse.

Hanafi Law :

Effect of "Ila" : If the husband effects "Īlā'" to his wife and the period of four months passes away without his having recourse to her (by words or acts) an irrevocable divorce shall (automatically) get effected on her.⁵

Qadi's decree not necessary : According to Ḥanafis in case of "Īlā'" divorce gets effected without the intervention of a Qāḍī, only the passing away of the prescribed period is the condition. But according to Imām Shāfi'ī the separation shall take effect only by the decree of a Qāḍī. The assertions of 'Uthmān, 'Alī, 'Abdullah b. Mas'ūd, Zayd b. Thābit, 'Abdullah b. 'Abbās and 'Abdullah b. 'Umar are in accord with that of the Ḥanafis.⁶ The rule of conduct of Hanafis in this connection is preferred.

Maliki Law :

Under the Māliki law, the Qāḍī shall ask the husband to resume his sexual connections with his wife or to divorce her. If the husband refuses or fails to comply with the Qāḍī's order, the Qāḍī shall himself dissolve the marriage.^{6a}

Shafi'i and Hanbali Laws :

Al-Shafi'i and Ahmad b. Ḥanbal have expressed the same view as that of Mālikis.^{6b}

Reasons for difference of Views :

The difference between the Ḥanafi and the other Sunni schools arises due to different interpretations of the Qur'anic verse II : 227 surah *al Baqarah* about *Ilā'*, quoted above.

The Ḥanafi school argues that the husband's not breaking the vow for four months is a proof of his firm intention to divorce the wife. They also

⁵Al-Shi'ranī : op. cit. vol. ii, p. 125; Al-Shaybānī : *Muwatta*, Karachi p. 258-59; Damād Āfandi : op. cit. vol. ii, p. 442.

⁶Al-Marghinanī; (d. 593 A.H.) : *Al-Hidāyah*, Karachi vol. ii, p. 401; *Rahmat al-'Ummah fi Ikhtilāf al-A'imma*, Cairo, 1300 A.H., p. 115.

^{6a}Ibn Qudāmah; Al-Mughni, Cairo, 1367 A.H. vol. vii, pp. 318-19.

^{6b}Ibid.

assert that *Ilā'* was a form of divorce in pre-Islamic Arabia and the *Shar'iah* has only placed conditions and limitations on it without changing its nature and effect. The other reason in support of this view is that *Ilā'* is a wrong caused to the wife by the husband, who denies her the right of marital life and as such he is punished by the dissolution of the marriage.^{6e}

The opposite view, on the other hand, is based on the plain reading of the verse, referred to above. According to them it speaks of entertaining an intention of divorce after the expiry of the period of the vow and not divorce itself.

Nature of Divorce :

Under the Hanafi law, the divorce that is effected by *Ilā'* amounts to an irrevocable divorce.^{6d} But according to Malik and Shafi'i and Ahmad Ibn Hanbal it would amount only to a Raj'i or revocable divorce.^{6e} Such divorce declared by the Qāḍī shall also amount to one revocable divorce. According to Ahmad b. Hanbal, as certain reports say, it would amount to an irrevocable divorce.^{6f}

Shi'i Law :

Under the Shi'i law the husband who vows an *Ilā'* should be major, sane and should possess understanding and have free will and intention to effect an *Ilā'*. The woman must be his lawfully married wife. There can be no *Ilā'* in respect of a woman married in *Mut'ah*. According to the Shi'i jurists, the *Ilā'* should be for a period exceeding 4 months. The *Ilā'* cannot be conditional. It cannot be cancelled by words (speech). It can only be cancelled by cohabitation. However, if the husband is temporarily unfit for cohabitation, he can do so by speech, declaring that he will cancel the *Ilā'* by cohabitation when he is able to do so. According to the Shi'i jurists, a divorce is not effected by the mere expiry of the time of 4 months. The wife shall have to make a petition to the judge. The separation effected by the divorce, given on an *Ilā'*, shall amount to a revocable divorce.^{6g}

^{6e}Ibn al-'Arabi : *Ahkam al-Qur'ān*, Cairo, 1957 A.D., vol. i, p. 190-81.

^{6d}*Fatāwa 'Ālamgiriyyah*, Kanpur, vol. ii, p. 112.

^{6e}*Ibn Rushd : Hidāyat al-Mujtahid*, Cairo, 1379 A.H., vol. ii, p. 84; Ibn Qudāmah, *Op. cit.* vol. vii, p. 331.

^{6f}*Ibid.*

^{6g}Al-Hillī : *Sharā'ī al-Islām*, Tehran, 1377 A.H., pp. 228-29.

Expiation :

If the husband has intercourse during the period of *īlā'* he will violate his vow. He should, therefore, make the expiation for the breach of his vow. It consists of manumission of a slave, or clothing or feeding ten poor persons. If he has not the ability to do either of them, he should keep fast for three days consecutively. This expiation is based on the dictates of the Qur'ān as contained in the verse of surah *Al-Mā'idah* (V : 92).

Enforcement of Ila' in Indo-Pakistan :

Ilā', though uncommon, is still enforceable in Pakistan and India. It was clearly mentioned in Section 2 of the Muslim Personal Law (Shari'at) Application Act, 1937, as applicable to Muslims. Clause ix of section 2 of the Dissolution of Muslim Marriages Act, 1939, lays down that a wife can seek the dissolution of her marriage on any ground which is recognised as valid for the dissolution of a marriage under Muslim law. A remark in *Sayeeda Khanum vs. Mohammad Sami* (PLD 1952 Lahore, 113 at 138) also supports this view.

Section 130. If a husband commits *Zihar* with his wife, she *Zihar* shall be forbidden to him till that person does not expiate for committing the same.

COMMENTARY

Zihār is derived from *zahr* which means "back" of man, animal or thing. Sexual postures are compared to riding or mounting; hence the abomination of likening one's wife to a woman within prohibited degrees. These peculiarities of diction and effects are due to the special traits of Arabic language and society.

Definition of Zihar :

If the husband compares his wife to a woman permanently forbidden to him such as mother, sister or aunts (paternal or maternal) it is called "*Zihār*". Likewise, his comparing any part of the body of his wife with any part of the body of a woman who is permanently forbidden to him, is included in the definition of *Zihār*, provided that part of the body mentioned be such by which the entire body may validly be understood.

Constituent of Zihar :

The constituent of *Zihār* is the "Comparison". If there be no comparison there shall be no *Zihār*. For instance, someone says to his wife, "you are my mother". This is outside the definition of *Zihār*. It will however constitute *Zihār* if he says "you are *like* my mother."

Capacity for Zihar :

The condition for *Zihār* is that the husband must be answerable in the eyes of law and be capable of so acting. That is, he must be sane and major. The woman must be his wife and marital coverture must be existing.

Effect of Zihar :

The effect of *Zihār* is that though the marriage contract shall remain intact but having sexual intercourse and relations with the wife shall be forbidden as long as the husband does not expiate the transgression. Hence the author of *al-Hidayah* says, "If the husband tells his wife that she is to him like the back of his mother the wife becomes forbidden to him. The husband's having sexual intercourse or indulging in kissing and endearment with the wife becomes forbidden till he expiates for his *Zihār*."7

Authority from the Qur'an :

Regarding *Zihār* God says, "If any men among you divorce their wives by *Zihār* (calling them mothers), they cannot be their mothers. None can be their mothers except those who gave them birth. And, in fact, they use words (both) iniquitous and false, but truly Allāh is one that blots out (sins), and forgives (again and again). But those who divorce their wives by *Zihār* then wish to go back on the words they uttered (it is ordained that such a one) should free a slave before they touch each other. This are ye admonished to perform and Allah is well-acquainted with (all) that ye do. And if any has not (the wherewithal), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones. This, that ye may show your faith in Allah and His Apostle. Those are limits (set by) Allāh. For those who reject (Him), there is a grievous penalty." (LVIII : 2-4)

The occasion for the revelation of this verse is narrated by 'Āi'shah that Khawlah Bīnt Tha'labah presenting herself before the Prophet (peace be on him) complained that she passed the prime of her life in the company of her husband but now that she had grown old he had committed *Zihār* to her. Hence she laid her complaint before God. It is said by 'Āi'shah that Khawlah had not yet moved away when the said verses were revealed.

The fact is that during *Jāhiliyyah* (the pre-Islamic period of Arabia) practice of *Zihār* was prevalent there and *Zihār* was considered to be a

7 Al-Marghinānī : op. cit. vol. ii, p. 409 :

”وإذا قال الرجل لامراته انت على كظهر امي فقد حرمت عليه لا يحل له وطها ولا مسها ولا تقبيلها حتى يكفر عن ظهاره“

form of divorce. In *Shari'ah* its characteristic was maintained but its effect was changed. It did not amount to divorce. Only the sexual intercourse was held to be forbidden till the expiation for it was made, for which no period was fixed.⁸ The marriage contract did, however, subsist.

Wife's Right :

After a husband has committed *zihār*. The wife can prevent her husband from intimacy with her till he has made the expiation. If he does not make it, then, the Qāḍī, on her complaint, is to imprison and punish him till he expiates or divorces her. The husband, according to the dictate of the Qur'ān shall not be allowed to leave his wife in suspense. If the husband declares that he has performed the expiation, his declaration is deemed sufficient and cannot be questioned. He may validly cohabit with his wife after the expiation.^{8a}

Shi'i Law :

According to Shi'ah jurists *Zihār* must be pronounced in presence of two reliable witnesses, who must hear the words of *Zihār*. On the husband's failure to perform his marital duties on account of *Zihār* the wife can approach the Qāḍī who will give the husband three months time either to expiate and resume his sexual connection with his wife or repudiate her by pronouncing divorce. If the husband fails to do either, the Qāḍī can restrict his food and water and even punish him and sentence him to imprisonment.^{8b}

Zihar in Pakistan :

The doctrine of *Zihār* is not in practice in Pakistan and India. It is proved by the very fact that there is no case-law on the subject. But the doctrine of *Zihār* is applicable to Muslims in Pakistan and India. Section 2 of the the Muslim Personal Law (Shari'at) Application Act, 1937, and subsection IX of Section 2 of the Dissolution of Muslim Marriages Act, 1939, make it clear. A remark in *Saeeda Khanam vs. Muhammad Sami* (P. L. D. 1952, Lahore 113, at p. 138) also supports this view.

Section 131. When the spouses have imprecated each other before the Presiding Officer of a Court, he shall thereon get separation effected between them.

Li'an (Imprecation)

⁸Ibid, pp. 409-16.

^{8a}Ibn Ābidīn : Radd al-Muhtār, Cairo, 1324 A.H., vol. ii, p. 590.

^{8b}Al-Hillī; *Sharā'i' al-Islam*, Tehran, p. 222.

COMMENTARY

Li'ān is the root of "Lā'in". This word is derived from La'n, the literal meaning whereof is "to put away,"⁹ because one who is subjected to La'n is put away from the all-pervading mercy of God.

Definition of Li'an :

Making by the husband and denial by the wife of a charge of adultery both on oath and invoking the curse and wrath of God by each on oneself if swearing falsely, is called *Li'ān*.¹⁰

The *Li'ān* revokes and replaces the legal punishment both in case of the husband's false accusation as well as in case of the wife's adultery. If the husband falsely accuses his wife of adultery and is not able to produce four eye witnesses it shall be incumbent upon him either to admit his accusation to be untrue making himself liable to the legal punishment for false accusation i.e. 80 lashes, or perform *Li'ān*.

Method of Performing Li'an :

The method of performing *Li'ān* is that the husband in presence of the presiding officer of the court shall say four times, "I swear in the name of Allah that I am assuredly true in what I say about the adultery of this woman". And at the fifth time the husband shall say about himself, "Curse of Allah be on me if I am untrue in the accusation of adultery that I have made against this woman", while pointing towards that woman. After this, the woman shall say four times, "I swear in the name of Allah that the husband is assuredly a liar in the accusation of adultery that he has made against me." At the fifth time about herself the woman shall say, "Allah's wrath descend on me if the husband is true in the accusation of adultery that he has made against me".¹¹

Qur'an's Commandment :

With respect to *Li'ān* it is laid down in the Qur'ān: "And for those who launch a charge against their spouses, and have (in support) no evidence but their own, their solitary evidence (can be received) if they bear witness

⁹Ibn Ḥajar 'Asqalānī (d. 852 A.H.) : *Fath al-Bārī*, Cairo, 1959 A.D., vol. xi, pp. 460-61.

¹⁰Al-Marghīnani : op. cit. vol. ii, p. 416 :

”والاصل ان اللعان عندنا شهادة مؤكدة بالايما م مقرونة باللعن“

¹¹Al-Shāfi'ī, Muhammad b. Idrīs (d. 204 A.H.) : *Al-Umm*, Cairo, 1381 A.H. vol. v, p. 286; Al-Qudurī, Abul Hasan (d. 428 A.H.) : *Al-Mukhtaṣar*, Qur'ān Mahal, Karachi, p. 168.

four times (with an oath) by Allah that they are solemnly telling the truth. And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie. But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah, that (her husband) is telling a lie. And the fifth (oath) should be that she solemnly invokes the wrath of Allāh on herself if (her accuser) is telling the truth¹²."

Occasion of the Revelation :

The narrative about the reason of the revelation of the verses is that 'Uwaymir al-'Ajlāni appeared before the Prophet and said, "O' Prophet, if someone finds his wife with someone else in a compromising situation and he beheads that person, would you in turn behead him ? If that someone does not behead that person what should he do in the circumstances?" On this occasion the directive for *Li'an* was revealed.¹³

Li'an has been made applicable only in the situation when the husband is unable to produce four witnesses in support of his accusation against his wife. Therefore, when the four eye witnesses of adultery are produced, the court has no power to pass order for *Li'an*.

Capacity for Li'an :

Hanafi Law : According to Ḥanafis *Li'an* may be effected between the spouses who are qualified to be witnesses. Thus, *Li'an* may be effected between major, muslim, free and just individuals.¹⁴ But according to one group of jurists *Li'an* may be effected between the husband and the wife whether they be free or slaves or one of them is a slave and the other is free; and whether they are just or they both are Muslims or the husband is a Muslim and the wife is kitabiyyah, a believer in a revealed book. They argue that no condition has been laid down in the Qur'ān for the married couple. They also argue that *Li'an* is not evidence; it is in fact a form of an oath, for evidence is not given by one for himself.¹⁵

¹²Al-Qur'ān, Surah Al-Noor (The Lights) : XXIV : 6-9,

”والذين يرمون أزواجهم ولم يكن لهم شهودا إلا انفسهم فشهادة احد هم اربع شهادات بالله انه لمن الصادقين.....“

¹³Abū Da'ūd : *Al-Sunan*, Karachi 1369 A.H. p. 305; Ibn Rushd : op. cit. vol. ii, p. 115.

¹⁴Al-Marghīnāni : op. cit. vol. ii, p. 417.

¹⁵Ibn Rushd : op. cit. vol. ii, p. 118.

Shi'i Law : The Shi'i law of *li'an* is practically the same as the Sunni law. It is laid down in Sharā'i' al-Islam^{15a} that : (i) There can be no *li'an* with respect to a woman married by a *Muta'h* or temporary marriage; (ii) The wife should not be deaf or dumb. The husband should not be blind because then he is incapable of witnessing the wife's guilt; (iii) It is not necessary that the proceedings of *li'an* should be held before the *Qaḍi*; the parties can agree to follow the proceedings before any particular *mujtahid* (a duly qualified learned man in fiqh).

Effect of *Li'an* :

The effect of *li'an* is that the husband's having sexual intercourse with his wife becomes forbidden so long as the *li'an* remains in force. If the husband after effecting *li'an* retracts, i.e. he proves himself a liar, the prohibitory effect of *li'an* shall cease. After *li'an* (but before the *Qāḍī* effects separation between the couple) if the husband retracts i.e. he confesses that he had falsely accused his wife, in such event, it shall be lawful for the husband (without entering into re-marriage), to have sexual intercourse with the wife. If the *Qāḍī* effects the separation and thereafter the husband admits of his being a liar, the couple, by mutual consent, may re-enter into fresh marriage contract. But if the *li'an* continues, the wife, in such event, shall continue to remain forbidden to the husband. This is how the matter stands according to Abū Ḥanifah and Muḥammad Al-Shaybānī. According to Abu Yusuf, however, a perpetual prohibition is created on account of *li'an* and they can never unite in marriage in any case as the Prophet peace be on him, had said, "Those who effect *li'an* (both the parties) shall never unite". According to Imam Malik, Shafi'i and Ahmed as well everlasting separation shall get effected and in no wise they both would be able to reunite.¹⁶ But Abu Ḥanifah maintains that after its falsification neither the *li'an* nor the effect of *li'an* subsists. Hence, the wife can again become lawful to the husband.¹⁷ To the present writer, the view of Imam Abū Ḥanifah, because of the arguments in its support, appears to be preferable.

Al-Shi'rānī, the author of *Al-Mizān al-Kubrā*, writes that the averments of 'Umar, Ali, Ibn Mas'ud, Ibn Umar, 'Ata, Zuhri, Awza'i, Thawri and Sa'id b. Jubayr are also in accord with that of Abū Ḥanifah to the effect that on account of *li'an* a restriction is placed on sexual rights. When the husband belies himself i.e. he admits himself to be a liar, the restriction shall get removed.

^{15a}Al-Hillī : op. cit. Tehran, pp. 231-32.

¹⁶Al-Shi'rānī : op. cit. vol. ii, p. 127.

¹⁷Al-Marghīnānī : op. cit. vol. ii, pp. 418-19.

Al-Shi'rānī further writes that according to Mālik, and by a report according to Aḥmad b. Ḥanbal, the separation, on account of li'an shall get effected but it should be accompanied by the order of separation from the Qāḍī. The assertion of Abū Ḥanifah is to the same effect. It is a well known assertion of Ahmad b. Ḥanbal that separation shall not get effected without the li'an of the wife and the order of the Qāḍī. The Court official shall have to decree the separation between the two. According to Shāfi'i, however, separation shall get effected, on li'an being effected by the husband, particularly because on husband's li'an, the denial of parentage from the father's side is established.¹⁸

Separation through Li'an :

Ḥanafī Lāw : When the husband and the wife both have pronounced li'an the Qadi shall get separation effected between the two. According to Abū Ḥanifah and the Ṣāḥibyan, as long as the Qāḍī does not effect separation between that two, no separation takes place between the husband and the wife (though the husband's having sexual intercourse with the wife shall be forbidden). Contrary to this, Zufar and Shāfi'i are convinced of separation by li'an itself. Therefore, according to them, if one of the couple dies after li'an they shall not inherit each other.¹⁹ While according to Ḥanafis the right of inheritance shall remain intact till an order of separation is passed by the Qadi after li'an.

According to Hanafis the event of li'an shall fall in the order of an irrevocable divorce. According to the three A'immaḥ, however, it shall come under the order of dissolution of marriage. The observance of the term of probation shall be incumbent upon the wife and she shall be entitled to maintenance and separate residence.²⁰

Mōlikī Law : Imām Malik has expressed the opinion that a separation takes place when the husband and the wife have taken the prescribed oaths even before the Qadi's order.²¹

Shāfi'i Law : According to Imām Shafi'i the husband's imprecation results in a separation between the parties without any order of the Qāḍī.²²

¹⁸Ibid.

¹⁹Al-Shafi'i op. cit. vol. v, p. 290.

²⁰Al-Shi'rānī : op. cit. vol. ii, p. 127; Al-Qur'ān, Surah, *al-Munafiqun* (The Hypocrites) LXIII : 1,

”إذا جاءك المنافقون قالوا نشهد انك لرسول الله“

²¹Muhammad b. Aḥmad : Jawahar al-'Uqūd, p. 177.

²²Ibid, p. 178.

Shī'ī Law According to Shī'ī law, the mandate relating to li'ān is established by the li'ān itself. The marriage gets dissolved *ipso facto* after the parties have taken the oaths. The separation on account of li'ān is *faskh* (dissolution) and not a divorce.²³

Modern Legislation :

Section 2 (ix) of the Dissolution of Muslim Marriages Act, 1939, provides for dissolution of marriage "on any other ground recognized as valid for the dissolution of marriage under Muslim law". Hence, the wife has to claim the dissolution of her marriage under the doctrine of li'ān, both in India and Pakistan. Recognizing the need for Court's decree, the Hanafi rule has been preferred in the above law.

Li'an and Pakistan Courts :

The courts of West Pakistan (now Pakistan) seem to give no recognition to li'ān. In the case of *Mst. Leelan vs. Rahim Bakhsh* (reported in PLD 1951 B & J 91), the High Court of Baghdadul Jadid (Bahawalpur) held that "the procedure prescribed by Muslim law for establishing the legal rights arising from the doctrine of li'an was not permissible in our courts for the simple reason that the Muslim Law of Evidence has been superseded by the Evidence Act." In this case Mst. Leelan had sought separation from her husband Rahim Bakhsh on the ground, amongst others, that her husband accused her of having illicit connections with some other person. The husband in his written statement admitted of his accusing the wife of unchastity and of being unfaithful to him.

In another case of Lahore High Court, *Ghulam Bakhsh vs. Husain Begum* (reported in PLD 1957 Lahore p. 998), Mr. Justice Kiyani and Mr. Justice B. Z. Kaikaus held, "The procedure for li'an was the result of circumstances which no longer exist. This procedure would be wholly out of place in the present state of law, and, at the same time there would be no jurisdiction of the civil court to compel compliance with it. The procedure of li'an was the result of the law of Islam relating to slander and adultery. It was a concession shown to the husband and the wife. Before the Pakistan court, the husband, does not ask for such a concession and the wife does not stand in need of any, for adultery of the wife is not punishable at all. Nor has the Civil Court the authority to force any person to take an oath in the form prescribed by li'an and to send him

²³Al-Hillī : Sharā'ī 'al-Islam, Tehran, pp. 231-32; Beirut, vol. ii, pp. 81 and 91 :

”ویشیت حکم اللعان بنفس الحكم .. فرقة اللعان فسخ وليست بطلاق“

to jail for refusing to take such oath. This impossibility of compliance with the procedure of *li'an* is by itself an argument in favour of the contention that an accusation of adultery without recourse to the procedure of *li'an* is a good ground for dissolution."

It was however, held by the Dacca High Court of the then East Pakistan that a wife may sue her husband for a divorce on the ground that he had brought a charge of adultery against her which she had denied and which had not been proved to be true. [PLD 1963 Dacca 947—14 DLR 854; PLD 1957 Lah. 998—AIR 1962 All. 570 (DB)]. It was further held that this imputation as to chastity must be of free will, not being influenced by any threat, undue influence, anger, passion due to quarrel between the couple, loss of balance of mind, etc. The wife can however compromise the matter and may give up her claim to divorce. It is absolutely within the discretion of the women. (PLD 1963 Dacca 947—14 DLR 854 DB). Such a divorce may be prayed for by a regular suit instituted for that purpose. (PLD 1958 Dacca' 62).

Procedure for li'an: In the olden times when the husband brought a charge of adultery against the wife she would approach the Qazi who would force the husband either to retract the accusation or to take an oath. If he withdrew the accusation he would suffer punishment for slander. If he chose to take the oath, the procedure for *li'an* followed and dissolution was granted. [PLD 1957 (W. P.) Lahore 998—PLR W. P. (1) Lahore 735—10 DLR W. P. Lahore 19]. The procedure of *li'an* was the result of the law of Islam relating to slander and adultery. [PLD 1957 (W. P.) Lahore 998—PLR 1958 W. P. (1) Lahore 735—10 DLR (W. P.) Lah. 19]. Now *li'an* is a form of obtaining a divorce by the wife if the husband brings a false charge of adultery against her, and it is not necessary for it to be attended by a formal imprecation. [PLD 1957 (W. P.) Lahore 998—PLR 1958 (W. P.) (1) Lahore 735—10 DLR (W. P.) Lah. 19—PLD 1951 Baghdadul-Jadid 90.]

Decree of the Court: An accusation of adultery does not *ipso facto* dissolve the marriage. A decree of court is necessary to do so. (AIR 1928 Bom. 285—110 I. C. 131).

Retraction of li'an: If a husband brings a charge of adultery on a strong ground and on coming to know that he has only been misled, retracts the charge *bonafide* and in all sincerity, and not merely as a device to defeat the suit of the wife, that may be a good ground for not decreeing dissolution. [PLD 1957 Lah. 998—AIR 1962 All. 570 (DB).]

A true and effective retraction takes place when the husband comes to the court and says, "I brought this charge because I was misled by certain circumstances. The circumstances were such that one would reasonably come to the conclusion that my wife was guilty. I have found now that,

in fact she is altogether innocent. I am very sorry. I withdraw the charge". (PLD 1958 Lah. 59). In order to constitute a valid retraction of *li'an*, it must be made before the commencement of the hearing, it must be *bonafide* and there must be an admission in it by the husband about making the charge and an unconditional acknowledgment by him that the charge is false. [PLD 1963 Dacca 947—14DLR 845 (DB)]. Where, therefore, the husband retracts an allegation of unchastity made by him against the wife in a suit for divorce filed by the wife against him and there is no suggestion that the retraction was not *bonafide*, the retraction is a sufficient ground for non-suiting the plaintiff. [AIR 1962 All. 570 (DB)—AIR 1927 All. 56—AIR 1929 Oudh 16—AIR 1940 Cal. 95]

Criticism :

In the light of arguments advanced by courts of West Pakistan the points that arise before us are as follows :

(1) *Li'an* is an Islamic procedure of evidence; (2) As the Islamic Law of evidence is not operative in Pakistan, the procedure of *li'an* cannot be acted upon; (3) The procedure of *li'an* is a concession; the husband does not ask for such a concession from Pakistan courts and the wife does not stand in need of it; (4) Civil Courts have no authority to force any person to take oath as prescribed by *li'an*; (5) Civil Courts have no authority to send any one to jail for refusing to take such an oath; (6) Compliance with the procedure of *li'an* is impossible; (7) Accusation of adultery against the wife by the husband is by itself a good ground for dissolution of marriage.

1. The argument that *li'ān* is a procedure of evidence, the present writer cannot, with due respect, accept. *Li'ān* is a part of substantive law, not that of the procedure included in the Islamic law of evidence. In Islam the accusation of adultery is such a crime that a legal punishment is fixed for it which is called *Had Qadhaf*, punishment for slander (falsely accusing one's own wife of adultery). In order to keep safe men from *Had Qadhaf* and women from *Had Zina* (punishment for adultery) and to restrict the virulent evil of accusation of adultery from spreading in the society God has particularly ordained the law of *li'ān*. The holy Qur'ān prescribes the method in which *li'an* is administered. That method too by itself has the force of substantive law. No action under *li'ān* shall be taken at variance with it. As the word *Shahādat* (evidence) occurs in the concerned Qur'ānic verse, the learned Judges probably thought *li'ān* to be a procedure of evidence. The fact is that *li'an* is not evidence; it is an oath. In the word *ash-hido* there is in the meaning of oath and assumes the status of substantive law. That is why all the jurists and traditionists have mentioned the *li'an* in *Kitab Al-Talāq*, (Book of Divorce) instead of *Kitab al-Shahādat*, (Book of Evidence).

The word *Shahādāt* (evidence) for the word *Qasam* (oath) has also been used at another place in the Qur'an. For example, Allāh speaking of *Munāfiqīn*, (hypocrites) says, "when the hypocrites come to you they swear that you are the Prophet of God." (LXIII :1)

2. So far as the point of view that our courts have no authority to enforce the procedure of *li'an*, is concerned, section 2 of the Muslim Personal Law (*Shari'at*) Application Act, 1937, can be referred to in rebuttal. The various modes of dissolution of marriage as envisaged in the Act, expressly include divorce, *Khul'a*, *Mubarat*, *Ilā'* and *Li'an* which the courts have been empowered to enforce. It is, however, correct to say that our courts cannot enforce the procedure of *Li'an* to avoid *Ḥad al-Qadhaf* and *Ḥad al-Zina* because both these acts are not crimes in Pakistan. But so far as the dissolution of marriage through *li'an* is concerned the courts under the provisions of section 2 of the said Act, 1937 could be held to be empowered to dissolve the marriage contract. (It may be noted that *Shari'at* Act, 1937 was not amended at the time when the said judgments in the above cases were pronounced).

3. To call *li'an* a concession may be correct as it is a view warranted by the consequences. But it does not by itself, in any manner, affects its legal status. It is, however, correct, that under Pakistan Penal Code adultery and accusation of adultery not being crimes, it is futile for the couple to have recourse to *li'an* for the solution of their problem i.e. to escape the punishment prescribed in the Qur'an.

4. To say that Civil Courts cannot compel one to take oath by way of *li'an* is questionable. If the contention of the non-authority of Civil courts in this respect be held to be correct, then the right of the dissolution of marriage contract through *li'an*, as certainly referred to and provided by section 2 of the *Shari'at* Application Act, 1937, shall be unwarrantably frustrated.

5. Likewise, to say that civil courts, in the event of one refusing to perform *li'an* have no authority to commit him or her, as the case may be, to jail is a point worth consideration. The authority of committing one to jail is implied in the order for *li'an* itself. Besides, in the event of non-compliance of their order courts have, in any event, the power of awarding *taz'ir* which includes punishment of imprisonment. Our Courts act as Qadis in the matter of dissolution of Muslim marriages.

6. It does not appear to be correct to say that to put the procedure of *li'an* into practice is impossible. Indeed, this much may be said that the primary purpose of *li'an* (protecting the husband from *Ḥad al-Qadhaf* and the wife from *Ḥad al-Zina*) has been negated by omissions of the Pakistan Penal Code. But the law relating to separation of a couple on account of

li'an still subsists. In any case, an amendment in Dissolution of Muslim Marriages Act can be made specifically permitting *li'an*.

7. The learned judges have held that the accusation of adultery is by itself a good cause for the dissolution of marriage. This may be said to be correct when the accusation is proved to be false; but if the same is proved to be true would the court in that event hold merely the accusation of adultery a reasonable cause for effecting separation? Apparently not, for it would penalise a truthful husband (who should be left master of the situation).

Modern Legislation :

The Muslim Personal Law (*Shari'at*) Application Act, 1937, giving a description of matters to which the Muslim Personal Law (*Shari'at*) was made applicable in undivided India, included *talaq*, *ila*, *zihar*, *li'an*, *khul'a* and *mubārāt*, as then in force in Indo-Pakistan sub-continent. While repealing the said enactment by West Pakistan Muslim Personal Law (*Shari'at*) Application Act, 1961, so far as its application to West Pakistan (now Pakistan) is concerned, the above mentioned matters were replaced by a single word "divorce". The argument may be that the different matters provided in the previous enactment being different forms of *Talōq* are included in divorce. Yet it is expedient to specifically mention them to obviate any confusion that may arise.

Suggestion :

However, in the light of the above discussion, one can come to the conclusion that there are difficulties and obstacles in putting *li'ān* into practice. It shall be opportune that necessary amendments be introduced in the *Shari'at* Application Act so that the courts may not feel reluctant in acting upon the clear and explicit bidding of the holy Qur'ān. The West Pakistan *Shari'at* Act of 1961 and Family Laws Ordinance VIII of 1961 be amended so as to include *Ila*, *Zihar* and *Li'an* and accusation of adultery should find its proper place in the Penal Code of Islamic Republic of Pakistan, which is committed to enforce injunctions of the Qur'ān.

It will, perhaps, not be improper to add here that the Pakistan Women's Rights Commission has recommended an imprisonment of six months for the offence of accusation of adultery. The recommendation is in direct conflict with the commandment of the Holy Qur'ān as contained in *Surah Al-Nur*, verses 4 and 5, which read as under :

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation), flog them with *eighty stripes*; and reject their evidence ever after : for such men are wicked transgressors, unless they repent thereafter and mend (their conduct): for Allah is Oft-Forgiving, Most Merciful."

CHAPTER—XVII

Khul'a and Mubarat

Section 132. The release secured by the wife from the husband from the marriage-tie, at her instance, on paying or consenting to pay compensation to him, is called

Definition of
Khul'a.

Khul'a.

COMMENTARY

Khul'a is derived from the word خلع (*Khal'un*) which literally means extracting out one thing from another. Technically, the word "*Khala'a*", on the line of *Naza'a*, means "taking out" or "taking off", for instance "*Khala'a al-Thawb*" means "he took off the clothes". The *Khul'a*, in *Shari'ah*, means that a husband after accepting a compensation from his wife renounces over her his rights and authority under the marriage contract.

Other definitions :

Shaykh Kamāluddīn Ibn Humām has said in his book "*Fatḥ al-Qadīr*" that the husband's relinquishment, with the word "*Khul'a*", of his title and rights under marriage contract in lieu of consideration is called *Khul'a*.¹ Dāmād Āfandī too has in his book "*Majma' al-Anhur*" defined *Khul'a* in the same words.² Al-Kāsānī has in his book, *Badā'i' al-Ṣānā'i'* said that *khul'a* is of two kinds : One is *Khul'a* without compensation and the other is *Khul'a* with compensation. Hence, he writes, "If the husband, in case of *khul'a* without compensation, intended from the word *Khul'a* to effect divorce the same shall take effect without compensation. Indeed, in case of "*khul'a* with compensation," the *Khul'a* shall not take effect without (mentioning) compensation".³ It is stated in *Fatāwā Qūdī Khan* that *khul'a* signifies a relinquishment of right and authority over his wife by the husband dissolving the marital relationship

¹Ibn al-Humām : *Fatḥ al-Qadīr*, Cairo, 1356 A. H. vol. iii p. 199;
Al-Kāsānī : *Badā'i' al-Ṣānā'i'*, Cairo, 1328 A.H. vol. iii, p. 152.

²Dāmād Āfandī : *Majma' al-Anhur*, 1328 A. H. vol. i, p. 447.

³Al-Kāsānī : op. cit. vol. iii, p. 151; Ibn Nujaym : *Baḥr al-Rā'iq*, Cairo, 1311 A. H. vol. iv, p. 77.

at the desire of the wife in lieu of compensation paid by her to the husband out of her property.^{3a}

Views of the Four Imams :

Abū Ḥanīfah has stated that the dissolution of marriage for consideration with the consent of the wife is called "*Khul'a*".^{3b} Mālik b. Anas has expressed the view that every divorce in lieu of consideration is called *khul'a*, irrespective of the fact that the word *Khul'a* has or has not been used. In other words, Mālik recognizes no distinction between *Khul'a* and *ṭalāq bil māl* (divorce in consideration of property). According to Al-Shafi'i every word which brings about a separation between the spouses for a consideration is called "*khul'a*".^{3c} As to Aḥmad b. Ḥanbal two versions are reported from him. According to one version, *khul'a* is a separation of spouses in lieu of consideration realized by the husband from his wife. According to another version, it is a divorce.^{3d}

Difference between *Khul'a* and *Talaq* :

There is a difference between *khul'a* and *Talāq* as follows:—

1. A divorce is pronounced by the husband at his own initiative. A *khul'a* is given at the instance of the wife when they cannot maintain the limits of Allah.
2. In divorce the husband becomes liable for immediate payment of the wife's dower, if deferred, and still unpaid, but in *khul'a*, it is the wife who makes a payment to the husband in order to induce him to release her from the marriage-tie and the consideration may consist of the dower itself.

Talaq bi'iwad al-Mal :

The expression "*Talāq bi'iwad al-māl*" connotes and denotes "*Ṭalāq*" as well as the sale of the proprietorship or title of the marriage i.e. the sale of divorce by the husband to the wife in lieu of property.^{3e} Thus, the wife may say, "I have purchased the right of divorce from you for (so much)" or the husband may say, "I have sold the right of divorce to you for (so much)".

^{3a}Qaḍī Khan : *Fatawa*, Kanpur, 1310 A. H., vol. ii, p. 256.

^{3b}*Fatawa 'Alamgiriyyah*, Kanpur, 1349 A. H., vol. ii, p. 118.

^{3c}Ibn Qudamah : *Al-Mughnī*, Cairo, 1367 A. H. vol. vii, pp. 56-57.

^{3d}Ibid.

^{3e}Shāykh Nizam : *Fatāwā Alamgiriyyah* : Kanpur, vol. ii, p. 118;

Ibn Ābidin : *Radd al-Muhtar*, 1324 A. H. vol. ii pp. 575, 580-81.

Khul'a and Talaq 'ala'l-mal or Talaq bi'iwad al-mal :

1. The marriage is dissolved in *Talāq bi'iwaḍ al-māl* by the use of the word "*Talāq*", but the word "*Talāq*" is not used in the case of *khul'a*.
2. In *khul'a* dower shall generally be extinguished, but not in the case of *Talāq 'ala'l-māl*.¹³
3. Another difference is that if the consideration is unlawful, the divorce shall be irrevocable in the case of *Khul'a*, but revocable in the case of *Talāq bi'iwaḍ al-māl*.

Indo-Pakistan Law and Practice :

Their Lordships of the Privy Council have stated, "A divorce by *Khul'a* is a divorce with the consent and at the instance of the wife and in which she gives or agrees to give a consideration to the husband for her release from the marriage-tie. In such a case the terms of the agreement are matters of arrangement between the husband and the wife, and the wife may, as consideration, give up her dower and other rights or make any other arrangement for the benefit of the husband," (*Moonshee Buzloor Rahman v. Lateefun Nissa*, 8, M.I.A. 379). The Lahore High Court has also expressed the same view. (*Saddan v. Faiz Bukhsh*, I.L.R. 21 Lahore 402).

Khul'a in Indo-Pakistan :

Though *khul'a* without compensation means, in effect, divorce with its implications, it has attained special meaning in the sub-continent of Pakistan and India. Common practice here is that the wives renouncing their amounts of dower secure separation from their husbands. In other words, *khul'a*, in Pakistan and India, amounts to obtaining divorce for consideration. In Indo-Pak subcontinent, however, even in cases of *khul'a* with compensation the word "divorce" is used. That is to say, the husband instead of saying that he effects *khul'a* (releases his wife so and so from his bondage of marriage) says that he divorces her, though he ought to use the word *khul'a* instead of the word "divorce". It is, therefore, essential that in "*khul'a* with compensation" instead of the word "divorce" the word "*khul'a*" should be used.

Hence our courts, keeping in view the difference between "*khul'a*" and "divorce with consideration", should, at the time of dissolution of the marriage contract, make the husband use the word "*khul'a*", not the word "divorce", as *khul'a* here means that the husband, on getting compensation from the wife and by using the word *khul'a* extinguishes his rights and title under the marriage contract.

Expression for khul'a : Under the Sunni law it is not an essential condition of *khul'a* that only the Arabic language should be used to obtain or to give a *Khul'a*. The spouses can use any language which they know and use. *Fatāwa-Qaḍi Khan* has given a number of expressions in Persian by which a *khul'a* can be effected. It is also stated in *Fatawa 'Alamgiriyyah* that *khul'a* given in Persian language is valid.^{3f} Hence if a *khul'a* is permissible in Persian, it is obvious that it can be given in any other language also. This view finds support from the fact that the wife should understand the meaning of the expression of *Khul'a* because *Khul'a* carries consideration and there can be no consideration unless it is understood by the party concerned.^{3g}

Shāfi'i Law : Under the Shāfi'i law every divorce in consideration of property constitutes *Khul'a* irrespective of the fact whether the word "*Khul'a*" has been used or not. It is, however, necessary that the word or expression must refer to a *Khul'a* whether expressly or by implication.^{3h}

Māliki Law : The Māliki law is the same as the Shāfi'i law.³ⁱ

Hanbali Law : The Hanbali law prescribes the use of certain specified words such as *Khul'a*, *Faskh* (cancellation) and *Fidyah* (ransom) and describes it as that divorce in which the husband separates from his wife by the use of certain specified words for a consideration accepted by him.^{3j}

Shī'i Law : *Khul'a* must preferably be pronounced in Arabic. The word *Khul'a* must be followed by the *Talāq* (Divorce). The *Khul'a* must be effected in the presence of two just witnesses.

Section 133. The husband is entitled to effect *khul'a* to his wife on compensation equal to or less or more than the dower. But in the event of disagreement as to the amount of compensation, the court shall have power to fix the quantum of compensation.

Quantum of
compensation
for *Khul'a*

COMMENTARY

It has been laid down in the Qur'ān : "But if you decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back".⁴

^{3f}Fatāwā 'Ālamgiriyyah, op. cit. vol. ii, p. 123.

^{3g}Ibn 'Ābidin : op. cit. vol. ii, p. 574.

^{3h}Ibn Qudamah : *Al-Mughni*, vol. vii, p. 57.

³ⁱIbid.

^{3j}Al-Hilli : *Sharā'i' al-Islam*, Beirut, vol. ii, p. 69.

⁴Al-Qur'an, Surah Al-Nisā (The Women) iv : 20,

”وان اردتم استبدال زوج مكان زوج و آيتيم احداهن قطاراً فلا تاخذوا منه شيئاً“

The dictate is based on expediency. The wife, in such situation, is put to the inconvenience of having her marriage dissolved by the husband, and so she must not, in addition thereto, be put to financial loss. Hence the above stated Qur'ānic verse, in its broader sense, forbids the husband from realising any compensation from the wife in lieu of effecting "*khul'a*", when he himself is the initiator of *khul'a*. In other words, if the husband is to be blamed for the disagreement or discord, then he is forbidden to realise from the wife any compensation for effecting *khul'a*.

Jurists' view :

It is declared in "*Al-Hidayah*" that if cruelty is from the side of the husband his realising from the wife compensation for effecting *khul'a* is disapproved. If the insubordination is from the wife, in that case, the husband may take back only the property given to her by him. His taking more is equally disapproved"⁵

Prophet's Tradition :

To support the directive that a husband should not take back more property than what he has given (to his wife) there is the Prophet's saying regarding the wife of *Thābit b. Qays*. There, a difference arose (between the couple) on account of the wife. So when the wife of *Thābit b. Qays* in reply to Prophet, said "Yes, I would return back the garden and give some (more) property as well", the Prophet saying, "ما الزيادة فلا" stopped her from giving back more.⁶ There is another tradition too from 'Aṭā b. 'Azib to the effect that the Prophet has said, "Only that property should be accepted back from the wife released under *Khul'a* which had been given by the husband to her and not more than that."⁷

Traditions of the Companions and the Successors :

With respect to the quantum of compensation for *khul'a* there are different averments from the *Ṣiḥābah* (Companions of the prophet) and *Ṭabi'īn* (Successors of the companions of the prophet). Ibn al-Qayyim has stated thus :

- (a) According to some, taking back more than what the husband has given to the wife is prohibited.

⁵Al-Marghīnānī : *Al-Hidayah*, Dewband, 1380 A.H., vol. ii, p. 384; Ibn Humam : *Fath al-Qadīr*, 1356 A.H., Cairo, vol. iii, p. 203; Damād Āfandī : *Majma' al-Anhur*, Cairo, 1328 A.H., vol. i, p. 447.

⁶Al-Bayhaqī : *Al-Sunan al-Kubrā*, Deccan, 1353 A.H., vol. vii, p. 314.

⁷Al-Bayhaqī : op. cit; Ibn Humām, op. cit. vol. iii, p. 204.

(b) According to others taking back more is permissible.

(c) According to still others it is disapproved.

Amongst the Companions of the Prophet, Abū Bakr considers the taking of more to be unlawful and maintains that the husband shall be made to return the same to the wife. Ṭa'ūs and Zuhri also agree with the first view. They hold that it is not lawful for the husband to take back more than what he has given to the wife. According to 'Aṭā, if the husband takes back any thing more than the dower he shall be made to restore the same to the wife. Awzā'i too has said that it is not competent judicially for the husband to take any thing from the wife except what he has given her.⁸

With respect to the second view, 'Abd al-Razzāk has reported from Ma'mar and Ma'mar from 'Abdullah b. Muhammad b. 'Aqīl that Rabī' bt. Mu'awwdh b. 'Afrā' told him that she obtained *Khul'a* from her husband in return for every thing that she was owner of. When the matter was taken to caliph 'Uthmān, he held the same to be lawful. On the other hand, with respect to the third view, it is reported by 'Alī Ibn Abi Ṭālib through Ḥakam b. 'Uyainiyah that he forbade the husband from taking back more than what he had given.

Views of the Four Imams :

According to Abū Ḥanifah taking back more is disapproved.⁹ Mālik and Al Ṣhāfi'ī, however, hold that taking back more than the dower is lawful.¹⁰ The assertion of Aḥmad b. Ḥanbal corresponding to that of Abu Hanifah is that the husband shall be made to return to the woman what in addition he had given her.¹¹

Muḥammad al-Shaybani writes in his book "Muwatta", "If the wife in return for anything gets herself released through *Khul'a* it shall judicially be lawful; but I do not approve that the husband should take from his wife more than what he has given to her, inspite of the fact that the differences had arisen on account of the wife. If the difference and dissention arise on account of the husband I do not approve of the husband taking any thing

⁸Ibn al-Qayyim : *Zād al-Ma'ād*, Cairo, 1369 A.H., vol. ii, p. 35.

⁹Ibid.

¹⁰Ibn Rushd : *Bidayatul Mujtahid*, Cairo, 1379 A.H., vol. ii, p. 67.

¹¹Ibn Qayyim : *Zād al-Ma'ād*, Cairo 1364, vol. ii, p. 35.

¹²Muḥammad al-Shaybānī : *Muwaṭṭa*, Karachi, p. 251; Al-Jaṣṣāṣ; *Ahkām al-Qur'ān*, Cairo, vol. i, p. 395.

at all. If he does take something, though it shall be lawful judicially but in all conscience, (i.e. between man and God) it shall be loathsome. Samé is the assertion of Imam Abū Hanifah".¹² Similarly, Al-Shaybani in his another work, "*Kitāb al-Āḥkār*", reports through Hammād and Ibrahim, Imam Abū Hanifah's assertion, "when the cruelty be from the side of the husband his accepting compensation for *Khul'a* is not lawful".¹³

Al-Kāsānī in his book, "*Bada'i' al-Ṣanā'i'*" has written: When cruelty and excesses be that of the husband it is not lawful for him to take any thing from the wife as compensation for *Khul'a*. If the husband, however, accepts compensation it shall be judicially lawful.¹⁴

Reason for difference of opinions :

The basis of different opinions of the jurists regarding the quantum of compensation in *Khul'a* is due to their reliance on different interpretations of the law. Those persons who hold the taking of a quantum larger than what the husband has given to his wife as compensation for effecting *Khul'a* to be lawful, base their argument on the Qur'ānic verse, "If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allāh, there is no blame on either of them if she gives something for her freedom".¹⁵ They take its apparent meaning that the Holy Qur'ān does not limit compensation either way. They further rely on Qiyās and hold *Khul'a* to resemble those matters in which compensation is paid. Hence, according to them, whatever compensation is agreed upon between the parties it shall be legal. If the husband demands more than that he has given to the wife and she agrees to it the same shall be legal.

On the contrary, the jurists, who forbid the taking of more than what the husband had paid, argue on the basis of tradition narrated by Abū al-Zubayr viz. that Thābit b. Qays b. Shamās intended to effect *Khul'a* to his wife and when the Prophet inquired of his wife whether she would return that to her husband which he had given to her as dower, she replied, "Yes ! and more besides it". Thereupon the Prophet forbade her from giving more.¹⁶

¹³Muhammad al-Shaybanī: *Kitāb al-Āḥkār*, Karachi, Chap. on *Khul'a*.

¹⁴Al-Kāsānī : *Bada'i' al-Ṣanā'i'*, Cairo, 1328, A. H., vol. iii, p. 150: Al-Shaybani : *Muwatṭa*, Karachi, p. 251.

¹⁵Al-Qur'ān, Surah Al-Baqarah, (The Cow) II, 229,

"فان خفتهم الا يقيما حدود الله فلا جناح عليهما فيما افتدت به"

¹⁶Ibn al-Qayyim : *Zād al-Mā'ūd*, Cairo, 1369 A.H., vol. ii, p. 35.

Judicial View :

The High Court of West Pakistan, Lahore held that in accordance with the circumstance of each case the courts, with a view to remove hardship, may themselves fix a suitable quantum of compensation for *khul'a*.¹⁷

Section 134. What is capable of being legally given as dower is capable of being the subject matter of compensation for *Khul'a*.
 Nature of Compensation

COMMENTARY

The objects that can be given as dower may also form the objects of compensation in case of *khul'a*; because the object that can be fixed as dower in a marriage contract can perfectly be made a compensation for dissolving the marriage.¹⁸

Different Views :

According to Abū Ḥanifah and Al-Shāfi'ī it is necessary that the compensation for *khul'a* with respect to its nature must be known and be of ascertainable value. According to Mālik, however, an unknown and unascertainable thing too may form compensation for *khul'a*.¹⁹ The reason of this difference is that, according to Abū Ḥanifah and Al-Shāfi'ī, the compensation for *khul'a* resembles the consideration in a sale; hence all the attributes of consideration for sale shall have to be observed in the matter of compensation for *khul'a* as well. But according to Mālik, however, compensation for *khul'a* has the characteristic of a gift or bequest; hence its existence at the time (of *khul'a*) was unnecessary.

Probably the reason for distinguishing "Compensation for *khul'a*" from "Consideration in sale" by Mālik is that the Holy Qur'ān has used the word "*fidyah*" (ransom) for compensation or *khul'a* which cannot be synonymous with "consideration for sale". But on a dispassionate view, according to the present writer, the view-point of Abū Ḥanifah and Al-Shāfi'ī, in this respect, appears to be justified. Compensation for *khul'a* must be something known and ascertainable to eliminate disputes.

If the husband effects *khul'a* to his wife in return for wine, or hog, or such other prohibited things, as compensation, whether, in such a case, the

¹⁷ *Bilqis Fatima vs. Najmul Ikram*, PLD 1959, Lahore, pp. 566-82.

¹⁸ Ibn Hūmam : op. cit. vol. iii, p. 207; Damād Āffandī : op. cit. vol. i, p. 448; Ibn Nujaym : op. cit. vol. iv, p. 82.

¹⁹ Ibn Ruṣḥd : *Bidayatul Mujtahid*, Cairo, 1379 A.H., vol. ii, pp. 66-67.

compensation shall be deemed satisfied or not? All agree that *khul'a* pronounced to the wife in such cases shall take effect.²⁰ It is said in several books of fiqh, viz. *Al-Mukhtaṣar* by Al-Quduri,²¹ *Fath-al-Qadir*²² and *Sharah Wiqāyah*²³ that the wife in such cases shall stand irrevocably divorced. But according to Abū Ḥanīfah and Mālik, in the circumstance, the woman shall also be made to pay (on compensation) a sum equivalent to proper dower.²⁴ If, however, the husband effects 'divorce' (instead of using the word "*khul'a*") to his wife in lieu of forbidden things, no compensation shall become due from the wife and a revocable divorce shall take effect. In the first case, the word *khul'a* being "allusive divorce", shall come under the purview of the dictate of "irrevocable divorce", whereas in the second case the word "divorce" being expressly pronounced shall come under the purview of the dictate of revocable divorce. The rule is, if "*khul'a*" be effected for compensation and the compensation on some ground be held to be null and void the *khul'a* shall not be null and void; rather it shall take effect as irrevocable divorce. If "divorce" be effected for consideration and the consideration on some ground be held to be null and void, it shall take effect as revocable divorce.²⁵ The husband, in that case, shall have the right of having recourse to his wife during her term of probation. In the same manner *fāsid* (irregular or vitiating) stipulations too do not make *khul'a* null and void.²⁶ In this respect the view-points of the four schools of law are briefly recounted below :

Ḥanafī law : Whatever is lawful to be accepted for dower can also be lawfully accepted as consideration for *khul'a*. Thus it can consist of such things as immovable property, cash, jewellery etc. But it cannot consist of things which cannot be lawfully possessed by a Muslim. Thus it cannot be wine, pork etc. But if the husband agrees to effect *khul'a* to his wife in consideration of an unlawful object, the *khul'a* shall be effected, but the payment of such consideration would not be incumbent on the wife.^{26a} This is due to the fact that a Muslim husband cannot lawfully possess such an object and so he cannot ask the wife to give it to him.

²⁰Ibid.

²¹Al-Qudeerī : *Al-Mukhtaṣar*, Qur'ān Maḥal, Karachi, p. 68.

²²Ibn Humām : *Fath al-Qadīr*, Cairo, 1356 A.H., vol. iii, p. 206.

²³Ubaydullah b. Mas'ūd : *Sharḥ Wiqāyah*, Delhi 1927, vol. ii, p. 124.

²⁴Ibn Rushd; *Bidāyatul-Mujtahid*, Cairo, 1379 A.H., vol. ii, p. 124.

²⁵Ibn Humām : op. cit.; *Damād Affandī* : op. cit.

²⁶Ibn Nujaym : *Baḥr al-Rā'iq*, Cairo, 1311 A.H., vol. iv, p. 87.

^{26a}Ibn al-Ābidin : *Radd al-Muḥtār*, op. cit. vol. ii, pp. 573-76; Al-Mar-ghinānī : *Al-Hidayah*, op. cit. vol. ii, p. 385.

Māliki Law: Under the Māliki law all things which are lawful can validly form the consideration for *khul'a*. If the consideration consists of such things as are forbidden like pork, wine or something which has been obtained by theft or violent means or by usurpation, then the *khul'a* shall be valid but the husband shall not be entitled to any consideration.^{26b}

Shāfi'ī Law: Under the Shāfi'ī law all things which can be given for dower can be given for *khul'a*. It should consist of lawful things. The wife must be capable of delivering it to the husband. If it consists of such things as are not lawful like pork, wine, etc., then the wife shall have to pay *mahr mithl* i.e., the dower of a woman of equal status^{26c}

Hanbali Law: Aḥmad b. Ḥanbal holds that if *khul'a* is agreed on for an unlawful thing it will be effected, but no consideration shall be payable by the wife.^{26d}

Consideration taken by compulsion, deceit or fraud :

Free consent presupposes that the wife's consent to a *khul'a* has not been obtained by fraud or deceit. The Privy Council has thus held that when a *khul'a* is given but the husband fails to establish that the wife did seek or obtain it of her own free will and after fully understanding the significance of *khul'a*, then a divorce shall be effected, but the abandonment of her dower or payment of other consideration that the wife had agreed to pay shall not be valid or binding on her. (*Moonshee Buzuloor Rahman vs. Lateef-un Nissa*, 8 M. I. A, 379). Same is the view of Hanafi jurists.

Māliki Law: Under the Māliki law a husband has to return the consideration received by him if his wife proves that she was forced to ask for the *khul'a* on account of her husband's ill-treatment or on account of his being tainted with such a defect as would entitle her to get a separation from him^{26e}. The *khul'a*, however, shall be binding on him.

Shāfi'ī and Hanbali Law: The Shāfi'ī law with regard to consideration paid under compulsion or fraud is the same as that of Ḥanafis. Under the Hanbali law, if a person ill-treats his wife in order to force her to seek a *khul'a* then no *khul'a* shall be effected and the wife shall be entitled to the return of the consideration paid by her. If the husband is

^{26b}Ibn Rushd : *Bidāyat al-Mujtahid*, op. cit. vol. ii, p. 73.

^{26c}Ibn Qudāmah : *Al-Mughni*, op. cit. vol. vii, p. 73.

^{26d}Ibid.

^{26e}Ibn Qudamah : *Al-Mughni*, op. cit. vol. vii, p. 55.

guilty of ill-treatment but without any intention to coerce her to seek a Khul'a and a Khul'a is given then a divorce shall be effected but payment of consideration shall not be valid.^{26f}

Effect of non-payment of Consideration on Khul'a :

The failure of the wife to pay the stipulated consideration does not cancel the Khul'a but the husband shall be entitled to recover the same from her under the law. He can also set it off against any claim that she may have against him. If the wife promises to give a consideration which does not exist then no consideration shall be payable; Khul'a shall be effected but she shall have to return the dower. But if the wife deliberately deceives him and offers as a consideration for Khul'a something over which she has no right or authority even then the Khul'a shall be binding on the husband but the wife shall have to pay consideration.^{26g} This view has been adopted by the Courts also. (*Saddan vs. Faiz Buksh*, 1 Lahore, 402; 55 I. C. 184). According to Abū Ḥanifah, the wife shall have to return the dower if she has realized it. If not, then it shall be extinguished. According to Abū Yūsuf and Muḥammad, she shall have to pay the stipulated consideration or its equivalent.^{26h}

Section 135. If the husband effects *Khul'a* without mentioning compensation, the wife's right to dower shall not lapse.

Effecting *Khul'a*
without mention-
ing compensation

COMMENTARY

If the husband tells his wife, "I pronounce *Khul'a* to thee" but makes no mention of compensation and the wife accepts it, then, according to *Zāhir al-riwāyat*, the wife's right to dower shall not lapse. In the *Muḥīṭ*, however, it is said that whatever dower the wife had realised till then shall be hers and the part of dower that has remained unrealised from the husband shall lapse.²⁷

It is, however, written in *Fatāwā 'Ālamgīri* that if the husband, without mentioning any compensation, effects *Khul'a* to the wife, the spouses shall stand exonerated from the rights of and obligations to each other. If the wife has already realised the dower she shall have to pay it back to the husband as the very pronouncement of Khul'a is commonly considered

^{26f}Ibid.

^{26g}Ibn Nujaym : *Al-Bahr al-Rā'iq*, Cairo, op. cit. vol. iv, p. 85.

^{26h}Ibn 'Abidīn : op. cit. vol. ii, p. 576.

²⁷Ibn Humām : op. cit. vol. iii, p. 219; Ibn Nujaym : op. cit. vol. iv, pp. 84-98.

to carry with it the sense of the payment of compensation.²⁸ To the present writer, however, pronouncing *Khul'a* without agreement on, or talk of compensation comes within the purview of an "Allusive divorce". Hence, neither the compensation can be held due on the wife nor should the financial rights of the wife lapse. (For further discussion see Commentary under Sections 139-140 *infra*).

Section 136. If the Court is satisfied that the husband and the Validity of *Khul'a* wife on account of disagreement between them cannot live together in accordance with the limits prescribed by Allāh, it shall be competent for the Court to order the husband to pronounce *Khul'a*, notwithstanding his disagreement. In case of his failure, the Court shall itself effect separation by way of *Khul'a* on wife's paying compensation to the husband.

Provided that if the fault lies with the wife or the fault does not lie with either of the couple yet the circumstances demand the dissolution of marriage by *Khul'a* the Court shall so order on the payment of appropriate compensation by the wife to the husband.

COMMENTARY

There are five opinions available in the books of *fiqh* as to the propriety or validity of *Khul'a* :

1. *Khul'a* basically is not valid.
2. *Khul'a*, though detrimental, is in all circumstances valid.
3. *Khul'a* is not valid except when the husband finds the wife to be an adulteress.
4. *Khul'a* is not valid except when the spouses apprehend that they would not be able to maintain the limits set by Allāh.
5. *Khul'a* is, in all circumstances, valid except when it is injurious.²⁹

Basis of *Khul'a* :

The basis and the origin of the legality of *Khul'a* is the Qur'anic verse: "A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives) except when both parties fear that they would be unable to keep the limits ordained by Allāh. If ye (judges) do indeed fear that they would be unable to keep the

²⁸ *Fatāwa 'Alamgiriyyah*, Kanpur, vol. ii, p. 121.

²⁹ *Ibn Rushd : Bidāyatul Mujtāhid*, Cairo, 1379 A.H., vol. ii, p. 68.

limits ordained by Allāh, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allāh, so do not transgress them" (11 : 229).

The limits prescribed by Allāh in this verse mean the directions regarding a happy social life. Same is the assertion of Ta'ūīs as well.³⁰

Under this verse the following conditions must be fulfilled for the due application of the rule, viz.

- (a) Apprehension of the husband and the wife that they cannot live within the limits of Allāh.
- (b) It is the wife who seeks a separation from the husband.
- (c) It must be she who is to pay the consideration.

The verse thus means, if there be such a dislike between the husband and the wife that it becomes difficult to lead their life in mutual love and happiness the wife may, on payment of compensation, obtain *Khul'a* from the husband. That is, *khul'a* is permissible when there is no possibility for happy union between the couple and there is the apprehension that due to their extreme differences they shall not be able to live in accordance with the dictates of *Shari'ah*. However, if the fault lies with the husband, in the fulfilment of his obligations to his wife, the acceptance of compensation for *khul'a* by him is forbidden in *Shari'ah*.

The propriety of *Khul'a* is established from the verse in the event of such a difference between the couple that their living together becomes impossible. Hence *Khul'a*, according to Da'ud b. Ali al-Zāhirī, is valid in the circumstance when the husband and the wife both are apprehensive of the fact that they would not be able to maintain the limits of God.³¹ Same is the rule of conduct of Zāhiriyyah sect.³² Nu'man is of the view that *Khul'a* shall be valid only on account of injury caused.³³ According to Ibn

³⁰ Al-Jaṣṣās : *Ahkām al-Qur'ān*, Cairo. 1335 A.H., vol. iii, p. 391; Fath al-Qadir, op. cit. vol. iii, p. 199; Al-Bukhārī : *Al-Sahīḥ*, Karachi, vol. ii, p. 794 :

”وقال طاؤس الا ان يخافا ان لا يقيما حدود الله فيما افرض لكل واحد منهما على صاحبه في العشرة والصحبة“

³¹ Ibn Rushd : *Bidāyatul Mujtahid*, Cairo, 1379 A.H., vol. ii, p. 68 :

”وقال داود : لا يجوز الا بشرط الخوف ان لا يقيما حدود الله“

³² Ibn Humām : *Fath al-Qadir*, Cairo, 1356 A.H., vol. iii, p. 199.

³³ Ibn Rushd : *Bidayatul Mujtahid*, Cairo 1379 A.H., vol. ii, p. 68 :

”يجوز الخلع مع الاضرار“

Rushd the philosophy of *Khul'a* is that it is a right within the power of wife similar to the husband's right of divorce. Thus, when life becomes troublesome for the wife she may make use of her right of getting *Khul'a* effected. Likewise, when some trouble arises for the husband due to the wife, he may make use of his right of divorce.³⁴

Explanation of the Commentators of the Qur'an :

Qurtubi : Qurtubi in his famous commentary, "*Al-Jāmi' al-Aḥkām al-Qur'ān*" has expressed the opinion that the above stated verse of the Holy Qur'an means that Allāh made it unlawful for the husband to take any compensation for *Khul'a* from his wife. The ground of effecting *Khul'a* is stated to be only the apprehension that the spouses shall not be able to maintain the limits ordained by Allāh. This verse demands that each of the spouses should ponder and search their hearts whether the wife shall be able to fulfil her obligations to the husband which are incumbent upon her (but which she abhors) through the marriage contract. If she cannot do so, there is nothing wrong for her in paying the compensation to her husband; neither there is anything wrong for the husband in accepting compensation for *Khul'a* from the wife. This verse addresses the couple. The pronoun stands for both of them. It has further been said that the word "*Khawf*" means "Knowledge". That is to say the couple must be knowing (or understanding) that they would not be able to maintain the limits ordained by Allāh. This gives them the fear of the occurrence of unpleasant events. This word "Fear" carries with it the sense of "Presumption". It has further been argued that in the phrase "*fa in Khiftum*" (then if you fear) its subjects have not been named. They are the rulers (wulāt). This interpretation has been adopted by Abū 'Ubaydah who maintains that the words of Allāh "*Khiftum*" (implies *more than two*) put, besides the couple, others as well in "fear". If it was intended only for the couple, i.e. fear exclusively for the couple, then, Allāh must have as well used in the earlier expression of the verse "*Khiftumā*" (implies *two*) and this proves the fact that effecting "*Khul'a*" is the jurisdiction of Sulṭān (or the State through its judiciary, if the spouses do not agree between themselves).

In the above Qur'anic verse, maintaining amiability of association by both (the couple) has been made incumbent (impliedly). The verse is addressed to officials and arbitrators who, not being officials, are engaged in such affairs. A woman's not maintaining the limits ordained by Allāh is her neglecting or avoiding of the performance of her duties towards her husband as well as not obeying him at all. This has been stated by Ibn 'Abbās, Mālik b. Anas and generality of jurists. Abū al-Ḥasan (al-Karakhī)

³⁴Ibid.

and a group alongwith him are of the view that, "When the wife tells her husband that she would not obey any of his orders, or she shall not carry out any of his biddings, *Khul'a* shall become valid." Imām Ṣha'bi said that the phrase, "الأيقما حدود الله" (not maintaining by the spouses of the limits of God) implies malice, enmity, and disobedience on their part. 'Aṭā b. Abi Rabāh has said that *Khul'a* shall be valid when the wife tells her husband, "I hate thee, I do not love thee and so on". It shall not be committing sin if the wife pays her husband any compensation for his effecting *Khul'a*.³⁵

Bayḍāwī : Bayḍāwī in his commentary on the Holy Qur'an, *Anwār al-Tanzīl* known as *Tafsīr Bayḍāwī*, has said, "And it is not lawful for you that you take anything of that (i.e. the dower) what you have settled on your wives. It is stated that Jamila felt strong aversion against her husband Thābit b. Qays. She came to the Prophet of God and said, "Neither I nor Thābit are there (i.e. I and Thābit cannot co-exist); and nothing can bring our heads together (alluding to posture in intercourse). By God, I do not find fault with his piety and morality. But I hate infidelity in Islam. I cannot bear him on account of my deep aversion. I raised a corner of the flap of the tent. I saw him coming along with a few men. He was the blackest, shortest and ugliest of them all". This occasioned the revelation (of this verse). Jamila, therefore, secured *Khul'a* from her husband restoring to Thābit, as compensation, the garden that was given to her as dower by him. This verse is addressed to the officials because the matter of taking and giving compensation relates to them. It is they who have to pass orders regarding this matter when it is brought before them."

"There is another opinion that it is addressed firstly to the couple, then to the officials. But this interpretation creates some confusion in the known form of reading and arrangement of the Qur'an. If the spouses, on account of forsaking the dictates that are made incumbent upon them through their marriage contract, are not capable of maintaining the limits set by God, and if they (i.e. the officials) also consider that the couple shall not be able to maintain the limits set by God, then it should not be held sinful for the wife to get herself free by making payment of compensation to her husband, (i.e. there is no sin for the husband in accepting the compensation that the wife pays to him for getting herself released from him by obtaining *Khul'ā*. These are limits set by God. The word "*Hudūd*" (limits) here refers to "Dictates". No one should go beyond the limits set by God. Those who go beyond those limits they are cruel (to themselves). Putting forward the fear of punishment to prevent contraven-

³⁵ Abū 'Abdullah Muhammad Al-Ansari Al-Qurtubī: *Al-Jamī' al-Aḥkām al-Qur'ān*, Cairo, 1936 A.D., Pt. iii, p. 137.

tion of the dictates is sanctional. Apparently, therefore, the verse proves the fact that *Khul'a*, without unpleasantness and difference among the couple, is not valid."³⁶

Zamakḥshari : Zamakḥshari in his commentary on the Holy Qur'an known as *Tafsir al-Kashshāf 'an Ghawamiḍ al-Tanzīl* quoting the above verse (11 : 229) has stated, "If it is said that the verse is addressed *solely* to the Ruler and officials, it is not they who receive the compensation from or pay it on behalf of the women. I, however maintain, that it is correct to say that firstly it is addressed to the couple and secondly to the Ruler and officials."³⁷

Nasafi : Al-Nasafī, too, in his commentary of the holy Qur'an, *Madārik al-Tanzīl*, known as 'Tafsīr Nasafī' has explained that the words "*fa in khiftum*" refer to officials. It is firstly addressed to the couple and secondly to the officials."³⁸

Opinions of Abu Hanifah and al-Shafi'i :

In the event of such a difference between the couple that they are apprehensive of not maintaining the limits set by God, Imām Abū Ḥanifah holds that getting *Khul'a* effected is perfectly valid. According to Imām Shāfi'ī, however, doing so is not valid. Imām Shāfi'ī, in his "*Kitāb al-'Umm*" says, "If the husband says that he would not allow separation to his wife nor would he do justice to her, he could be forced to do justice to her but would not be forced to separate her from him."³⁹

Opinion of Ibn Hazm :

Ibn Ḥazm says that God has laid down, "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange

³⁶Al-Baydāwī : *Anwār al-Tanzil* (known as *Baydāwī*) Muḥtabā'i Press, Delhi, 1326 A.H., p. 150.

³⁷Maḥmūd b. 'Umar Al-Zamakḥsharī (d. 528 A.H.) : *Al-Kashshāf 'an Ghawāmiḍ al-Tanzil*, Cairo, 1354 A.H., p. 139 :

"فان خفتهم الا يقيما حدود الله وان قلت لأئمة والحكم فهو لاء ليسوا باخذين منه ولا بمؤتيهن (قلت) يجوز الامران جميعا ان يكون الاول الخطاب لازواج وآخره لأئمة والحكم"

³⁸Abdullā b. Aḥmad b. Maḥmūd (701 A.H.) : *Madārik al-Tanzil* (known as *Tafsīr Nasafī*), Cairo, vol. i, p. 148 :

"فان خفتهم ايها الولاة : وراز ان يكون اول الخطاب لازواج وآخره للحكم"

³⁹Al-Shāfi'ī : *Kitāb al-'Umm*, vol. v, Chap. on *Khul'a* and *Nushūz* (Disobedience), p. 172 :

"وان قال لا افارقها ولا اعدل لها اجبر على القسم لها ولا يجبر على فراقها"

an amicable settlement between themselves and such settlement is best" (IV : 128). Further, God has laid down, "Except when both parties fear that they would be unable to keep the limits ordained by Allāh. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allāh, there is no blame on either of them if she give something for her freedom" (II : 229). These two verses with respect to *Khul'a* are conclusive. Ibn Hazm further states that "*Khul'a* is forbidden without the sanction of the Sulṭān (the Ruler)." On the authority of Wakī' through Yazīd b. Ibrahīm al-Tustari and Rabi' (and he is Ibn Ṣabīh) who narrates from Hasan al-Baṣrī that he (Ḥasan al-Baṣrī) said : "*Khul'a* cannot be effected without the intervention of the Sultan." Further, Ḥammād Bin Zayd on the authority of Hajjāj b. Minhāl has stated the narrative through Yaḥya who is Ibn 'Atīq that he heard Muḥammad b. Sīrīn saying, "*Khul'a* is not valid without the intervention of the Sulṭān". *Khul'a*, therefore, shall not be valid unless the husband in such a situation first advises his wife to be reasonable. If she is reconciled it is well and good. If she is not reconciled, she must be chastised and beaten (lightly such as slapping on the back). If she is reconciled, it is as it should be. Otherwise they both should take their case to the Sulṭān (Ruler). He ought to appoint a mediator from the wife's family and another from that of the husband's family. Each of them should present their case before the Sulṭān exactly as they heard from them. The Ruler (now courts) should (in their discretion) either separate or unite them (the couple).⁴⁰

Traditionists' Illustrations :

In connection with the validity of *Khul'a* the incident of *khul'a* of the wife of Thābit b. Qays b. Shamās forms the basis of legislation. This incident has, as the basis of the validity of *Khul'a*, been referred to by most of the traditionists. Imām Bukhārī thus has reported through Ibn 'Abbās that the wife of Thābit b. Qays came to the presence of the holy Prophet and said, "O' Prophet of God ! I do not find fault with the good behaviour and beliefs of Thābit b. Qays but I do abhor ingratitude (for hating my husband) in the state of Islam". The Prophet said, "Would you give the garden back to him?" She said, "Yes". The Prophet said to Thābit b. Qays, "Take back the garden and pronounce one divorce to her."⁴¹

⁴⁰Ibn Hazm (d. 456 A.H.) : *Al-Muhallā*, Cairo, Al-Tabā'at al-Muniriyyah, 1352 A.H., Pt. x, Aḥkām al-Khul'a, p. 237.

⁴¹Al-Bukhārī, *Al-Ṣaḥīh*, Karachi, vol. ii, pp. 94-95 :

Imām Bukhārī, in another narration, has used in this tradition the words of “امرہ ففارقها”, the Prophet ordered him, then, he separated her, instead of “طلّقها تطليقة” i. e., (the Prophet ordered) “pronounce her one divorce.” Besides, two names of the wife of Thābit b. Qays (one Ḥabibah and the other Jamilah) have been mentioned in different versions of the tradition. ‘Ikramah has stated that her name was Jamilah.⁴² In the report by ‘Ā’ishah, the lady is named as “Habibah bt. Sahl” which has been recorded by Abū Daud.⁴³ In some of the versions instead of one garden, two gardens are mentioned. In the version reported by Abū al-Zubayr it is also said that when the wife of Thābit b. Qays offered to give more besides giving back the garden, the Prophet by saying, “امّا الزيادة فلا” asked her to give back only the garden and forbade her to give anything more.

Abū Dā’ūd in his *Sunan* has reported the version of ‘Ā’ishah in the following manner: That Habibah bt. Sahl was in the marriage of Thābit b. Qays b. Shamās. Thābit gave beatings to her and she received a bone-fracture. She came to the presence of the Prophet and lodged complaint against Thābit. The Prophet called Thābit in his presence and said, “Take some of Ḥabiba’s property and give her up”. Thābit b. Qays inquired, “O’ Prophet of God! will that be correct?” The Prophet replied, “Yes”. Thābit said, “O’ Prophet of God! I have given her two gardens and they are in her possession”. The Prophet said, “Take those gardens back and give up Habibah”. Thābit did the same.⁴⁴

(from previous page)

”حدثنا ازهر بن جميل حدثنا عبد الوهاب لثقفى وحدثنا خالد عن عكرمة عن ابن عباس امرأة بن قيس اتت النبی صلی الله علیه وسلم فقالت : یا رسول الله ثابت بن قيس ما اعتب علیه فی خلق ولا دين ولكنى اكره الكفر فی الاسلام فقال رسول الله صلی الله علیه وسلم : اتردين علیه حدیقه؟ قالت نعم، قال رسول الله صلی الله علیه وسلم اقبل الحدیقة وطلّقها تطليقة“

⁴²Ibid.

⁴³Abu Dā’ūd : *Al-Sunōn*, Karachi, kitab al-Talāq, p. 303.

⁴⁴Ibid :

”حدثنا محمد بن معمر نا ابو عامر عبد الملك بن عمر ابو عمرو السدوسى المدینى عن عبد الله بن ابی بكر بن حزم عن عمرة عن عائشة ان حبیمة بنت سهل كانت عند ثابت بن قيس بن شہاس فضربها فکسر بعضہا فأتت النبی صلی الله علیه وسلم بعد الصبح فاشتكتہ الیه فدعا لنبی صلی الله علیه وسلم ثابتا فقال خذ بعض مالها وفارقها فقال وبصالح ذلک یا رسول الله قال نعم قال اصدقته حدیقتين وها بیدها فقال رسول الله صلی الله علیه وسلم خذها ففارقها ففعل“

The same incident is reported by Nasā'ī from the narrative of Rabi bt. Mu'awwad^h b. 'Afrā' who related "that the name of the wife of *Thābit* b. Qays was Jamīlah bt. 'Abdullah. Her hand had got fractured. Her brother had gone to the Prophet to lodge a complaint". The fact of the garden being returned is not mentioned in this narrative; rather there is the directive to the woman who did obtain *Khul'a* to wait for another marriage till her one menstrual period expires. Probably, because of this Nasā'ī has included this tradition in the chapter of "the Period of probation of a woman who gets *Khul'a*".⁴⁵ (Incidentally, it may be mentioned here that the period of 'iddat of the wife obtaining *Khul'a* is three periods and not one except in case of unconsummated marriage where there is no 'iddat at all. It is according to correct (ṣaḥīḥ) tradition. The tradition under reference however, relates to the option of woman to join her family after the expiry of one menstrual period. (For detail see chapter on *Iddat*, *infra*).

In a version given by another traditionist, Ibn Majah, the name of the wife is given as Jamīlah Bint Salūl. In yet another version Habibah bt. Sahl is also mentioned. It is written in this tradition that Habibah bt. Sahl, the wife of *Thābit* b. Qays expressed her abhorrence in these words, "By God, had I not been afraid of God I might have spit upon his face when he intended to have intercourse with me."⁴⁶

Analysis :

Concerning this incident some other narratives are also found in the books of traditions and the traditionists have thereon expressed their views. A study of these traditions makes it clear that the wife of *Thābit* b. Qays had really no complaint of cruelty or maltreatment by her husband, neither was she afraid of some harm to herself nor she entertained any grievance against his morality; rather the wife (who was said to be most beautiful) instantly started hating him in her heart because of his ugliness and short stature. In the night when *Thābit* came to her, it is possible, the wife might have refused to yield to him and resisted him. *Thābit*, on this, might have thrashed her and her hand or any limb might have got fractured. From "lodging the complaint in the morning", as a report has it, it appears

⁴⁵Al-Nasa'ī : *Al-Sunan*, Karachi, kitāb al-Talāq, p. 93 :

"أبو علي محمد بن يحيى المروزي قال أخبرني شاذان بن عثمان أخو عبدان قال ثنا أبي قال ثنا علي بن المبارك عن يحيى بن أبي كثير قال أخبرني محمد بن عبد الرحمن أن الربيع بنت معوذ بن عفراء أخبرته أن ثابت بن قيس بن شماس ضرب امرأته فكسر يدها وهي جميلة بنت عبد الله بن أبي فاتي أخوها يشتكيه إلى رسول الله صلى الله عليه وسلم فأرسل رسول الله صلى الله عليه وسلم إلى ثابت فقال له خذ الذي لها عليك واخل سبلها قال نعم فأمرها رسول الله صلى الله عليه وسلم أن تتربص حيضة واحدة فتلق باهلها،
 "والله لولا مخافة الله إذا دخل على لبست في وجهه"⁴⁶

that the incident took place during the night. In narrating the incident of spitting on Thābit's face, Ibn Majah has used the word, “اذدخل على” i.e. “when he intended to have intercourse with me.” In another narrative, it is stated that when the Prophet came out of his house early in the morning he found Ḥabibah standing outside.

However, the wife of Thābit b. Qays was not prepared to stay in his wedlock and the Prophet was convinced of the fact that the wife felt such repulsion for and was so sick of her husband that if *Khul'a* was not got effected between them, they would be unable to maintain the limits set by Allāh. This is the situation that is described in the Qur'ān. Some of the commentators have said that the Qur'ānic verse, “Then if ye (the judges) fear that they both shall not maintain the limits set by God” (II : 229), referred to above, had been revealed in this context and that was the first *Khul'a* in Islam.

Tirmizī also reports a tradition that the Prophet said, “The wife who obtains *Khul'a* from her husband without any reasonable or compelling cause shall be denied the odour of Paradise”. Another narrative lays down, “She will not smell the odour of Pradise.”⁴⁷ It becomes apparent from these narratives that the *Khul'a* is granted under extreme necessity only.

Khul'a under Compulsion by the Husband :

If the husband forces his wife to take a *khul'a* and she does so, a divorce shall be effected, but the payment of the consideration shall not be incumbent on her.^{47a} It is stated in *Jawahar al-Uqud* that if a husband forces his wife to seek a *Khul'a* under coercion as by threatening to kill her or beating her or by starving her, then a divorce shall be effected but the payment of any consideration shall not be incumbent on her. The divorce in such a case shall be *Raj'ī*, revocable.^{47b} The same view has also been stated in *Al-Mughni*.^{47c}

Khul'a given under the Influence of Drink :

There is a difference of opinion amongst the Sunni jurists in respect of *Khul'a* given under the influence of drink. According to Ḥasan b. Ziyād, Ab'ul-Ḥasan al-Karkhī and Abu'l Qāsim al-Ṣaffār, *Khul'a* under intoxication is not valid. *Al-Shāfi'i* is reported to have expressed different views at

⁴⁷ *Al-Tirmidhī*, *Al-Jāmi'*, Karachi, kitab al-Talaq, p. 151 :

”عن رسول الله صلى الله عليه وسلم قال ايما امرأة سالت زوجها طلاقاً من غير باس فحرام عليها راحة الجنة“

^{47a} *Ibn 'Ābidin : Radd al-Muhtār* op. cit. vol. ii, p. 576.

^{47b} *Muhammad b. Ahmad : Jawōhar al-Uqūd*, Cairo, 1374 A.H. vol, ii, p. 114.

^{47c} *Ibn Qudamah : Al-Mughni* op. cit. vol. vii, pp. 55-56.

different times. Abū Naṣr b. Muḥammad b. Salām says that *khul'a* shall be effected only if his act of drinking is voluntary and without any compulsive need. Abū Hanifah is, however, reported to have stated that according to *Istihṣān* the *Khul'a* is not valid, but according to *Qiyas*, it is valid. Abū Yūsuf also holds it to be valid. It is stated in *Fatawa 'Ālamgiriyyah* that such *khul'a* is valid.^{47e} (It may, however, be clarified that here *Khul'a* is effected by mutual consent without the intervention of the court).

Khul'a and the Court's Decree :

Imām Bukhārī has reported that Caliph 'Umar has held *khul'a*, to be valid though not effected in presence of Sultān (for the time being in authority). According to the generality of the theologians, too, the presence of Sultān (Ruler) is no condition for the validity of *Khul'a*.⁴⁸ Al-Kāsānī as well has held this view to be correct. Similar are the rulings of Ḥanafīs, Mālik, al-Shāfi'ī and Aḥmad b. Ḥanbal. The practice observed by 'Uthmān is also stated to be the same. Qāḍī Shurayh, Zuhri and Ishāq are of the same view. Ibn Qudāmah Maqdisi argues, "As the presence of any official is not obligatory at the contract of marriage or at the termination of the contract of marriage and at other such contracts arrived at by mutual consent, the presence of an official is no condition for *Khul'a*, being a similar contract for consideration."⁴⁹

The basic reasoning for this consensus opinion of the jurists is that if the parties themselves are agreed on effecting *Khul'a*, a decree of an official or a Qāḍī is not essential for its validity. Separation effected by mutual consent of the parties is, in term of *fiqh*, called "*Mubārār*", (see Section 139 *infra*), which is included in the order of *khul'a*. If, however, there is disagreement between the parties the decision, that the parties will not be able to maintain the limits set by God and that *Khul'a* has got to be effected, shall have to be made by the Qāḍī. In the circumstance it may be got effected through a court. If the wife, therefore, is desirous of breaking off the marital relationship and she is prepared to pay the compensation to the husband, Islam gives the right to the wife to appear either before the Ruler or in the Court set up by him, and sue for obtaining *Khul'a* from the husband. The Qur'ānic verse, "Then if ye (judges) do indeed fear that

^{47d}Qāḍī khān : *Fatāwa*, op. cit. vol. ii, p. 261.

^{47e}Shaykh Nizam : *fatwa 'Ālamgiriyyah*, op. cit. vol. ii, p. 125.

⁴⁸Al-Kāsānī : *Badā'i' al-Sanā'i'*, Cairo, 1328 A.H., vol. iii, p. 145.

⁴⁹Ibn Qudamah : *Al-Mughnī*, Cairo, 1367, A.H., vol. vii, p. 57.

they (the couple) would be unable to keep the limits ordained by Allāh," and the directive of the Prophet to Thābit b. Qays that he should take back his garden (or two gardens) and "pronounce divorce to his wife," are the clearest proof of the fact that, in the event of disagreement between the spouses, the court's duty, on the application made by the wife, is to get the *Khul'a* effected when it is satisfied that maintaining by them of the limits set by God in their lives is impossible. The decision given by the Prophet in the case of Thābit b. Qays certainly was in the capacity of the first Qāḍi in Islam.

Modern Legislation and *Khul'a* :

There has been *neo* legislation in most of the Muslim countries regarding wife's right of obtaining *Khul'a* from her husband, as discussed below:—

Egypt :

There appears to be no statute law on the subject of *Khul'a* in Egypt. However, it is dealt with in accordance with the general Ḥanafī law as laid down under section 280 of Act No. 31 of 1910. The sections 273 to 278 of the law dealing with *Khul'a* are given hereunder:—

Section 273. In case of disagreement between the married couple if they are apprehensive of not being able to perform the conjugal rights and fulfil the demands of marriage their effecting of divorce or *Khul'a* shall be valid.

Section 274. For the validity of *Khul'a* it is a condition that the husband who effects *Khul'a* must be capable of pronouncing divorce and the wife must be capable of being the subject of *Khul'a*.

Section 275. Compensation in *Khul'a* is no condition. Hence, *Khul'a* effected with or without compensation shall take effect, whether sexual intercourse with the wife has taken place or not.

Section 276. It shall be judicially correct for the husband to effect *Khul'a* to his wife for a higher compensation than what he had given to her.

Section 277. The effecting of *Khul'a* takes effect as irrevocable divorce whether it is with or without compensation. The intention of effecting three divorces therein shall also be correct. *Khul'a* is not dependent on a Court's decree.

(To the present writer, it seems that this provision of Egyptian law, wherein judge's decree has been dispensed with, implies a case

analogous to *Mubārāt*, because of the spouses mutually agreeing to separate.)

Syria :

The Syrian law incorporates the Islamic doctrine of *Khul'a* under which a wife can persuade the husband to divorce her by accepting a consideration. As contained in Qānūn al-Aḥwāl al-Shakhṣiyah, 1953, following are the relevant provisions of law relating to *Khul'a* that are in force in Syria :

Section 94. Every divorce takes effect as a revocable divorce except the one completed by three pronouncements, or that pronounced prior to consummation of marriage, or effected for consideration (i.e. *Khul'a*).

(It means that *Khul'a* effects an irrevocable divorce.)

Section 95. It is a condition for the validity of *Khul'a* that the husband who effects it must be capable of pronouncing divorce and the wife who is effected with the *Khul'a* must be capable of being subjected to it.

(b) If the wife has not attained the age of discretion and she is the subject of *Khul'a*, the payment of compensation for *Khul'a*, except in the case of an agreement with the guardian of her property, is not incumbent upon her.

Section 96. It shall be valid for each of the couple to revoke his or her proposal before its acceptance by the other.

Section 97. Every thing which is legally acceptable may be valid compensation for *Khul'a*.

Section 99. If the parties to *Khul'a* at the time of its being effected do not mention anything to the contrary they both shall be absolved of the rights of dower and of maintenance against each other.

Section 100. If the parties to *Khul'a* specifically stipulated that there will be no compensation, the case of the wife obtaining such a *Khul'a* shall come under the description of a simple revocable divorce.

Section 101. Maintenance of 'iddat shall neither lapse nor the husband shall be relieved of it, unless there is an agreement to the contrary in the contract of *Khul'a*.

Iraq :

The Qānūn al-Aḥwāl al-Shakhṣiyah, Iraq, 1959 (as amended in 1963) incorporates the law of *Khul'a*, under which a wife may persuade her

husband to divorce her by accepting a consideration for his doing so. While recognising this form of divorce, article 46 provides that like a divorce, a *Khul'a* also should be effected and registered in the Court. Following are the relevant provisions of law respecting *Khul'a* that are in force in Iraq :—

Article 46. (1) *Khul'a* terminates the bond of marriage when effected by the use of the word *Khul'a* or any other words having that meaning; it should be effected by means of a proposal and acceptance in the presence of the Qāḍī, subject to the provisions of article 39 of this law.

(2) It is a condition for the validity of *Khul'a* that the husband should have capacity to pronounce a divorce; also the wife must be the proper object of a divorce; a *Khul'a* shall (take) effect as an irrevocable divorce.

(3) A husband can agree to *Khul'a* in consideration of an amount less or more than the dower.

Tunisia :

The law regarding divorce which also covers *Khul'a* in Tunisia is that it cannot be effected without obtaining the judge's (Qāḍī's) decree. If the parties, however, do it by consent they are exempted from obtaining the judge's decree. (It is rather a case of *Mubārār*).

Morocco :

The Māliki law of *Khul'a* is enforced by the Moroccan Code with emphasis on the free desire of wife in such a transaction (Article 63). It is, however, only after the completion of twenty one years of age that a wife can enter into an agreement of *Khul'a* (Article 62). Further the consideration in a transaction of *Khul'a* should not prejudice the rights of the children.

The relevant provisions of law on the subject of *Khul'a* as in force are noted below :—

Section 61. It is lawful for the married couple to agree on divorce by means of *Khul'a*.

Section 62. The wife who has attained the age of discretion, can obtain *Khul'a*. If she has not attained the age of discretion and she obtains *Khul'a*, it shall take effect as divorce and the payment of compensation shall not be due on her without the consent of the guardian of her property.

Pakistan :

There is no specific statute law regarding *Khul'a* in Pakistan. Hence the Courts were in great difficulty in applying the correct law.

Husband's Consent and the Qadi's Authority : The question whether the husband's consent is a condition precedent to the dissolution of marriage by *Khul'a* or has the Qadi the power to separate the parties even against the wishes of the husband, assumed great importance in the Courts of Indo-Pakistan sub-continent.

The Courts, in their early decisions, generally expressed the view that a Qadi was not competent to do so. Thus it was held by the Allahabad High Court that a suit by a Muslim wife to compel her husband to give her a *Khul'a* divorce is not maintainable. It was held that the divorce by *Khul'a* is the sole act of the husband, and to exercise such power is wholly a matter within his own discretion and it cannot be demanded by the wife as a matter of right under the Muslim law. [*Mariam Bibi vs. Nur Mohd.* (1882) All. 83]. The Lahore High Court expressed the same view in two elaborate judgments. The first case is that of *Mst. Umar Bibi vs. Mohd. Din.* (A.I.R. 1945, Lahore: 51). It was held that it is only the husband or his agent who can effect a *Khul'a* divorce, and that it is not possible for a Qāḍī or Court to do so as no such powers vested in them. The second case was decided by a Full Bench and the same opinion was expressed. (*Sayeeda Khanum vs. Muhammad Sami*, 1952, P.L.D. Lahore: 113.) But the latter view of the Pakistan Courts as reported in PLD 1959 Lahore 566 and PLD 1967 Supreme Court 97 is that the Court has got such power, notwithstanding the unwillingness of the husband as discussed below.

Incompatibility of temperament is no ground for Khul'a : Mr. Justice Abdur Rahman (who was later on knighted) and Mr. Justice Harnes in the case of *Umar Bibi vs. Mohammad Din* (AIR 1945 Lah. 51) concurrently held that the court could not subscribe to the view that *Khul'a* could be effected without the consent of the husband.^{49a} The learned Judges held that the court could not dissolve a marriage on the mere grounds of incompatibility of temperament, dislike or aversion. In this particular case the court below had passed a decree dissolving the marriage on the ground that the wife was averse to her husband to such a degree that it was impossible for her to live with the husband comfortably and with peace of mind.

In another case viz. *Sayeeda Khanam vs. Mohammad Sami* (PLD 1952 Lah. 113) a full Bench of Lahore High Court consisting of the Acting Chief Justice A.R. Cornelius (who later on became Chief Justice of Pakistan),

^{49a}This judgement as considered in PLD 1967 S.C. 97 does not lay down the correct law. Also see PLD 1959 Lah. 566.

and Mr. Justice Mohammad Jan and Mr. Justice Khurshid Zaman took the same view and held that incompatibility of temperament, dislike or aversion of the wife to her husband cannot, under the Islamic law, form a valid ground for effecting divorce unless the husband agrees to it.

Court could grant Khul'a without the consent of husband : Later on, in the leading case "*Bilqees Fatima vs. Najmul Ekram*" (PLD 1959 Lah. 566), their Lordships Justice Shabbir Ahmed, Justice B. Z. Kaikaus and Justice Masud Ahmad held that if the court arrived at the conclusion that the couple would not be able to maintain the limits set by God, it could then get *Khul'a* effected without the consent of the husband by ordering the wife to pay a reasonable compensation to the husband.

Wife may claim Khul'a as of right : The Supreme Court of Pakistan in the case of *Khurshid Begum* (PLD 1967 S.C. 97), also adopted the same view and held that the wife is entitled to *Khul'a* as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union. Where the husband disputes the right of the wife to obtain separation by *Khul'a*, it is obvious that some third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the Qāḍī, with or without assistance of the *Hakams*. (PLD 1967 S.C. 97—Law Notes 1966 (SC) 59. But see : PLD 1967 A J & K 32—19 DLR (WP) 104 (DB) (Diss : PLD 1959 Lah. 566).

Khul'a is a mixed question of fact and Law, must be decided after framing issue on it : The plea of *Khul'a* may not always be a question of law. It may be a mixed question of law and fact. The parties may not agree to the amount of the benefits received under the marriage contract. The Courts, if they had jurisdiction, would have to make an enquiry if the parties may not live within the limits of Allāh and all these matters are matters of fact. If a party wants to raise the plea of *Khul'a*, in a suit for dissolution of marriage, she can do so by amending her pleading and there should be an issue about it. [PLD 1967 Azad J & K 32—19 DLR (WP) 104 (DB)].

Court must determine benefits received by wife in consideration of marriage : The wife is entitled to dissolution of marriage on the restoration of what she received in consideration of marriage if the Judge apprehends that the parties will not observe the limits of God. Where the Court dissolved the marriage of the parties on the basis of *Khul'ā* without considering whether the respondent had received any benefits in consideration of the marriage and was she prepared to restore the same, the conduct of the court

was criticised as improper and the case was remanded with the direction that the parties may be permitted to lead evidence as to what gifts, if any, and of what value, were given by the husband to the wife on the occasion of the marriage, so that if the husband wants to take more than the dower, the condition may be imposed on the wife to pay the additional sum, expended by the husband on her, before the grant of *Khul'a*. [PLD 1968 Lah. 411; 20 DLR (WP) 177; Law Notes 1968 Lah. 25].

Court may dissolve marriage by Khul'a instead of referring matter to 'Hakams' : The mere fact that the Qāḍī chooses to assume jurisdiction of the *Hakams* himself would not invalidate a dissolution of marriage ordered by him. [PLD 1969 B J 5].

Wife living in adultery cannot seek dissolution of marriage by 'Khul'a' : If the allegation made by the wife on the basis of which she claims dissolution on the principle of *Khul'a* is such as exposes her to criminal liability under the Islamic Law, but it is not possible for the Courts to impose punishment because there is no provision for doing so, it cannot furnish the basis for the Court to dissolve the marriage on the principle of *Khul'a*. [PLD 1968 Lah. 411; 20 DIR (WP) 117; Law Notes 1968 Lah. 25].

Khul'a not invalidated for non-payment of compensation : A divorce by *Khul'a* is effected with the consent of the parties^{49b} and at the instance of the wife when she gives or agrees to give consideration to the husband for her release and the husband accepts the offer. (PLD 1952 Lah. 113). The divorce by *Kuul'a* is not invalidated even when the wife does not pay the consideration she has offered but the husband can sue her for it. (8 M.I.A. 379).

Reference to "Hakams" : While '*Khul'a*' is operative in cases where the wife has "a fixed aversion" for her husband, in which case any amount of reconciliation would be of no avail, the appointment of *Hakams* in such a case would be of no use. On the other hand, in the case of *Shiqāq* since the provision relates to cases where there are differences between the husband and the wife, the possibility of reconciliation being always there, the reference of the matter to *Hakams* has been specifically provided for. Therefore, in case of *Khul'a* no reference to *hakams* need be made, and Court may (itself) dissolve the marriage. (PLD 1969 BJ 5).

"Khul'a" by Court on wife's request : There are two classes of cases of *Khul'a*; (1) by mutual agreement^{49b} and (2) by order by the Qāḍī or Court.

^{49b}With respect it is submitted that here the term *Khul'a* appears to have been used loosely. It is in *Shari'ah* called "*Mubarār*" and not *Khul'a*.

Dissolution of marriage takes place by the husband's pronouncing a *ṭalōq* in the first class of cases, and by the order of the Qāḍī or the Court in the second. Sanction for *Khul'a* under the orders of the Qāḍī is to be found in the express words of verse 11 : 229 of the Holy Qur'ān which is the word of God. Cases of *Khul'a* by mutual agreement do not strictly fall under the terms of the verse itself, but what is so effected is also *Khul'a* and justification for such cases has been found by the jurists by a process of reasoning and deduction from the words of the verse, or from the contract between the parties. The principle so deduced amply justifies the conclusion drawn by the jurists that *Khul'a* by mutual agreement is permitted in Islam, but the concept of *Khul'a* derived from instances of mutual agreement should not, in any event, be used to confuse the issue, and made to bear on cases of *Khul'a* under the orders of the Qāḍī, which are expressly covered by the verse of the Holy Qur'ān. [PLD 1967 Supreme Court 97; PLD 1975 A J & K 27—P L J 1975 A J & K 21 (DB)—P L D (1967) A J & K 32 dissented from].

Apprehension of transgressing the limits of God is the sole criterion for Khul'a : The wife is entitled to a dissolution of marriage on payment of consideration to the husband if the Judge apprehends that the parties will not observe the limits of God. This is not equivalent to granting a right to the wife to come to the Court at any time and obtain a *Khul'a* if she is prepared to restore the benefit she has received. There is an important limitation on her right. It is only if the Judge apprehends that the limits of God will not be observed, that is, the spouses will not obey God in their relation towards one another, that a harmonious marriage state, as envisaged by Islam, will not be possible, then he will grant a dissolution. The wife cannot have a divorce for every passing impulse. The judge will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift. [PLD 1967 S.C. 97—PLD 1959 (W.P.) Lahore 566—PLR 1959 (2) W.P. Lahore 321—14 DLR Lahore 193—PLD 1968 Lah. 411—LN 1968 Lah. 25—PLD 1975 Lah. 615—PLJ 1975 Lah. 215—PLD 1975 Lah. 805—PLJ 1975 Lah. 241—PLD 1975 AJ & K 27—PLJ 1975 AJ & K 21 (DB)—PLJ 1975 Lah. 256—PLD 1975 Lah. 766].

Khul'a may be granted by Court whereas in *Mubarāt*, the marriage can be dissolved by mutual consent without the aid of the Court. Hence, strictly speaking, it will not be correct to say that *Khul'a* covers two classes of cases.

It has only one class. If the husband does not agree to give *Kuul'a*, the Court on petition of the wife may dissolve the marriage by taking recourse to *Khul'a*.

Proof of each and every allegation not necessary : A wife seeking *Khul'a* was not required to prove that her each and every allegation was true, but only to show that her marriage had broken down and that there was no hope of reconciliation. Where the allegations of the wife against the husband were of a heinous nature, that he had administered opium to her, that he had beaten and assaulted her father and that he had made a false charge of adultery against her, the charge being that she was seducing her own father-in-law, *Khul'a* was granted. (PLD 1972 Kar, 540—Law Notes 1970 Kar. 269).

No Possibility of living together, a consideration for Khul'a : Where the husband had contracted a second marriage and there were four children from that marriage and his income was insufficient to maintain two families, Moreover the relations between the spouses were so much strained that there was no possibility of their living together happily, the Court ordered that *Khul'a* be granted to the wife. (PLD 1975 Lah. 615—PLJ 1975 Lah. 215). Where the parties did not resolve their differences throughout protracted litigation despite efforts made by the Courts, grant of decree for dissolution of marriage through *Khul'a* was justified. (PLD 1975 Lah. 805—PLJ 1975 Lah. 241). Where the husband was already married with five children and the marriage with the second wife was contracted against her wishes, the relations between the spouses had hit such a blow that they could never live together happily, the Court granted *Khul'a* to the wife. (PLD 1975 AJ & K 27—PLJ 1975 AJ & K 21 (DB)—PLD 1967 AJ & K 32 dissented from].

Consent by the husband : The permission of the husband or his agreement is not necessary for dissolution of marriage by *Khul'a* because the Court can give effect to an offer of *Khul'a* by the wife when it comes to the conclusion that the parties would not be able to observe the limits of God. [PLD 1967 S.C. 97—PLD 1959 Lah. 566—PLR 1959 (2) W.P. 321—11 DLR W.P. 193—PLD 1975 AJ & K 21—PLJ 1975 AJ & K 27 (DB)—PLD 1975 Lah. 805—PLJ 1975 Lah. 241—PLD 1975 Lah. 1136—PLJ 1975 Lah. 424 (DB)]. The old view as reported in 8 MIR 379, AIR 1943 Lahore and PLD 1952 Lahore 113 that the consent of the husband was necessary has now been superseded.

Amount of consideration to be paid by the wife : If the dissolution is due to some fault on the part of the husband there is no need of any restitution. If the husband is not in any way at fault, there has to be

restoration of property received by the wife, and ordinarily it will be the whole of the property. [PLD 1959 Lah. 566—PLR 1959 (2) E.P. 321]. The wife should be made to return the same as a condition precedent on grant of *Khul'a* in case the husband asks for their return. If a husband during a trial does not make any claim with regard to the return of benefits despite the knowledge that the Courts have ruled that he can claim the return, this conduct would show that he has not conferred any benefits or he would not seek the return thereof. (PLD 1975 Lah. 766—PLJ 1975 Lah. 256—PLD 1975 Lah. 805—PLJ 1975 Lah. 241). Where, however, the husband makes a demand the Judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received.^{49c} [PLD 1959 Lah. 566—PLR 1959 (2) W.P. 321—11 DLR W.P. 193]. The husband can even demand a higher amount than the dower paid to the wife. Though it is abominable on the part of the husband to have more than the dower itself in case of separation by *Khul'a*, yet if he insists, it is legally permissible for him to demand something more than the dower, and to the extent that he might have been out of pocket, in respect of gifts, given to the wife on marriage, he may, in law, demand restitution. This would necessitate an enquiry into the fact and the final decision as to what compensation must be paid by the wife for her relief must rest with the Court. (PLD 1967 Supreme Court 97). In such a case it is necessary for the Court to ascertain what benefits have been conferred on the wife by the husband as a consideration of the marriage and it is in the discretion of the Court to fix the amount of compensation. (PLD 1967 Supreme Court 97).

Suit for dissolution, if Khul'a may be granted : Where in a suit for dissolution of marriage, the wife fails to prove the allegations on which she has based her case but she did succeed by production of enough material to satisfy the trial Court that notwithstanding her above-noted failure she was entitled to a decree for dissolution of marriage on ground of *Khul'a*, the Court granted *Khul'a* to the wife. (PLD 1975 Lah. 516—PLJ 1975 Lah. 215). Dissolution of marriage by *Khul'a* was granted where the wife failed to prove allegations of cruelty, non-maintenance and desertion in her suit for

^{49a}With respect it is submitted that 'living together' *simpliciter* is not a benefit that is liable to be returned or compensated. The length of the period of living together may, however, weigh in favour of the wife when the court is awarding monetary consideration to the husband in lieu of *Khul'a*.

dissolution of marriage, because the Court felt that the evidence adduced showed that the spouses could not live within the limits of God. (PLD 1975 Lah. 805—PLJ 1975 Lah. 241).

Decree of Court necessary : In case of dissolution of marriage by *Khul'a* the right of the wife to the dissolution of her marriage becomes absolute and takes effect only under the decree of the Court. [PLD 1975 Lah, 1136—PLJ 1975 Lah, 424 (DB)].

Decree for restitution of conjugal rights does not bar suit for Khul'a : A decree for conjugal rights passed in favour of the husband does not create *res judicata* against the wife, in the matter of a suit for dissolution of marriage by *Khul'a*. A wife is not obliged to raise defence of dissolution of marriage to a suit for restitution of conjugal rights. Therefore, she can bring a suit for *Khul'a* even after a suit for restitution of conjugal rights has been decreed against her. [Law Notes 1975 Lah, 621—PLJ 1975 Lah, 425 (DB)].

Notice to Chairman necessary also in Khul'a : In a judgment recorded in *Muhammad Ishaq vs. Ahmad Hasan* (PLD 1975 Lah. 1118) it was held that in a case of *Khul'a*, that is, in case of dissolution of marriage through Court at the instance of wife, Section 8 read with Section 7 of the Ordinance shall be fully satisfied if the notice of the decree is sent to the Chairman *after* the decree and not before or contemporaneous with the institution of the suit. The Family Court would thus continue to follow the practice of sending a copy of the decree to the Chairman concerned but at the same time it is also necessary for the wife, in whose favour the decree is passed, to independently inform the Chairman about the decree as also to send a notice thereof to the husband in a formal manner.

Recommendation of the Women's Rights Commission :

The Pakistan Women's Rights Commission, in its Report published recently, has recommended that *Khul'a* be effected as a unilateral act of the wife without the aid of the Court and the Court may intervene *only* to settle the dispute, if any, between the spouses about the quantum of compensation. The recommendation of the commission can be said to be true to some extent in a case wherein the spouses agree in *principle* to separate on *Khul'a* by mutual consent. For *Khul'a*, in case of disagreement of the husband, it seems, the Commission has misunderstood the provision. It is not an absolute right *simpliciter* of a wife to terminate the marriage, at her own sweet will as and when she desires, merely on offering or agreeing to offer compensation

to her husband. In addition to wife's readiness to return to her husband the consideration received by her from her husband at the time and in consideration of her marriage, the necessary ingredients of *Khul'a* are : (i) there being in existence a "fixed aversion" against the husband and, (ii) on account of that, an apprehension on the part of the spouses transgressing the limits of God. The wisdom of Allah has not left the matter of terminating the marriage-tie into the hand of the wife. In the words of the Holy Qur'ān, it is the husband in whose hand is the marriage-tie "بِيَدِهِ عَقْدَةُ النِّكَاحِ" (11 : 237). On husband's refusal, it is the Qadi who will, on summary inquiry, decide the issue.

The Qur'anic text "فَإِنْ خِفْتُمْ أَلَّا يَفْقَهَا بَيْنَهُمَا حَدُودُ اللَّهِ" (11 : 229) casts a duty on a person in authority, to dissolve the marriage on wife's paying compensation to her husband, if they [more than two i.e. the couple and the Ruler (Qāḍī)], apprehend that the spouses will not maintain the limits set by God, as discussed earlier. (See explanation of the commentators of the Qur'an pp. 526-28 *supra*).

Section 137. For the validity of *Khul'a* it is a condition that the husband should be capable of effecting divorce and the wife should be capable of being the subject of it.

Capability of
effecting
Khul'a

COMMENTARY

So far as the capacity of the spouses for *Khul'a* is concerned, for both husband and wife there are certain conditions which must be satisfied by the parties for obtaining *Khul'a*.

Conditions relating to husband ;

Hanafi Law: According to Hanafi law a minor or insane husband cannot have the right to divorce his wife, and the father or other guardian cannot possess a better right than that of the minor^{49d}.

Māliki Law: Under the Mālik law too the husband should be major and sane but the guardian of a minor or insane husband can grant a *Khul'a* on behalf of a minor husband. The compensation is, however, to be received by the husband himself^{49e}.

^{49d}Fatāwa 'Ālamgiriyyah, op. cit., vol. ii, p. 125.

^{49e}Al-Shīrānī; *al-Mizan al-Kubra*, Cairo, 1279 A.H., vol. ii, p. 135; Ibn Rushd, op. cit., vol. ii, p. 57.

Shāfi'i Law : The rule under the Shāfi'i law is the same as that of Hanafis viz. the husband should be major and sane and that the guardian of a minor husband cannot grant a *khul'a* to the wife on behalf of the husband.^{49g}

Ḥanbali Law : The Ḥanbali law also requires that the husband should be major and sane.^{49h} As regards the guardian's power to grant a *Khul'a* on behalf of a minor or insane husband, there are two reports from Ahmad b. Ḥanbal in the matter. According to one the guardian of an insane husband can agree on *Khul'a* but, according to the other, he is not competent to do so.⁴⁹ⁱ

Conditions relating to wife :

Hanafi Law : According to Ḥanafi law, any adult and sane wife can seek a *khul'a*. The wife must also possess understanding and reason so that she can understand the significance and consequences of *khul'a*.^{49j} If she lacks in one or both of these essential conditions then the payment of the consideration stipulated by her shall not be incumbent on her, nor shall her dower be extinguished, but a revocable divorce shall be effected on the husband's acceptance of the offer and granting th *khul'a* to her.^{49k} This rule is based on the ground that she cannot realise the consequences of her act, namely, *khul'a*. If the girl is minor or is insane, her father or other guardian (for marriage) can obtain a *khul'a* for her, provided the consideration is paid out of the father's or guardian's personal property.^{49l} The father, too, shall not be liable for its payment unless he has taken a personal responsibility for payment of a specified consideration.^{49m}

Māliki Law : Under the Māliki law also the wife should be major and should possess understanding. A father or guardian may obtain a release on her behalf and pay out of the property of his minor daughter who is still under his authority, and whom he had contracted in marriage.

^{49g}Al-Shi'rani : *al-Mizān al-Kubra*, Cairo, 1279 A.H., vol. ii, p. 135; Ibn Rushd, op. cit., vol. ii, p. 57.

^{49h}Sharaf al-Din Musa al-Hijawi, op. cit., vol. iii, p. 252.

⁴⁹ⁱAl-Shi'rani, op. cit. vol. ii, p. 135.

^{49j}Ibn Nujaym, *al-Baḥr al-Rā'iq*, Cairo, 1311 A.H., vol. iv, p. 90; Ibn 'Ābidin, op. cit., vol. ii, pp. 583.

^{49k}Ibn 'Ābidin, op. cit., vol. ii, pp. 583-84.

^{49l}Ibn Rushd, op. cit., vol. ii, p. 57; al-Shi'rāni, op. cit., vol. ii, p. 135.

^{49m}Ibn 'Ābidin, op. cit., vol. ii, pp. 583-84.

This may be done even without the woman's consent,⁴⁹ⁿ if she is minor and under the control and authority of her guardian.

Shafi'i Law : Under the Shafi'i law too, the wife should be major and sane. If an insane girl asks her husband for *khul'a* for some consideration and the husband agrees to it, *khul'a* shall be effected but no consideration shall be payable. A revocable divorce shall, however, be effected. But if the father or guardian has given consent to the payment of the consideration, the dissolution shall amount to an irrevocable divorce and the consideration shall be so payable.^{49o}

Hanbali Law : Generally speaking, the Hanbali law on the subject is the same as the Hanafi law. Under the Hanbali law, a minor wife can obtain a *khul'a* with the consent of her father. The father or other guardian of such a girl can obtain a *khul'a* on her behalf, if he pays the consideration out of his own property.^{49p}

Shi'i law : Under the Shi'i law as under the Sunni law, the *khul'a* means the termination of marriage by the husband in lieu of consideration when the wife bears aversion for him. If the aversion is mutual, the termination of the marriage shall be called *Mubārāt*. The husband must be acting under free will. He must also have the intention to release his wife by *khul'a*. There can be no *khul'a* where such was not the intention of the husband, as when he grants it under intoxication or in a fit of anger, or in delirium. A *khul'a* by a minor boy, even with the permission of the guardian, is not valid. But in the case of a person of unsound mind his guardian can enter into an agreement for *khul'a* in lieu of the wife's dower. There is a difference of opinion among the Shi'ah jurists as to whether the guardian of a minor can grant a *khul'a* to the wife on his behalf. The jurists, who consider that *khul'a* effects as *faskh* (dissolution) of the marriage, hold that it is open to the guardian of a minor to grant a *Khul'a* on his behalf. But it is not lawful according to those who hold that *Khul'a* tantamounts to divorce.

The wife must be adult and sane and must possess understanding. It is necessary if her marriage has been consummated that she must be pure, i.e., free from monthly course at the time of *Khul'a* and no intercourse must have taken place during that period of purity except when she is a minor or has crossed child bearing age or the husband is away, or she is pregnant.

⁴⁹ⁿAl-Shi'rani, op. cit., vol. ii, p. 135; Ibn Rushd, op. cit., vol. ii, p. 57.

^{49o}Al-Ramli, Muhammad b. Abi'l-'Abbās, Nihāyat al-Muḥtāj, vol. vi, p. 386-389.

^{49p}Al-Shi'rani, op. cit., vol. ii, p. 135.

But if the marriage has not been consummated or the husband is absent, *Khul'a* can be given even when she is not in a period of purity. *Khul'a* of a pregnant woman is also valid.

The consideration agreed upon must be specific in quantity, description and kind and must be such as can lawfully be given to a Muslim. Hence consideration consisting of unlawful things such as wine, pig, etc., cannot form valid consideration. In case the consideration be unspecified the *Khul'a* would be invalid. There is no restriction to the amount or quantity of the consideration so that it can exceed the wife's dower (Al-Hilli : *Sharai'al-Islam*, Beirut, vol. ii, pp 69-72.)

Retraction :

Hanafi Law : According to Hanafis if the proposal of *khul'a* proceeds from the husband, as when he tells his wife that he is prepared to give *Khul'a* on receiving a specified consideration from her, then he cannot retract it till the wife expresses her consent or dissent to it.^{49a}

Shāfi'i Law : According to Shāfi'i, a husband has the right to withdraw his offer of *Khul'a* at any time before its acceptance by the wife. It is explained that the husband's offer is a conditional offer to effect bilateral agreement so that the contract is not completed till the consent of the wife, and so he can retract his proposal at any time before the contract becomes complete. Similarly, if it is the wife who has made the offer then she has a right to withdraw it at any time before its acceptance by the husband.^{49r}

Hanbali Law : Under the Hanbali law, the husband can retract his proposal at any time before its acceptance by the wife.^{49s}

Shī'i Law : Under the Shī'i law in case of non-payment of consideration, there would be an option for the husband to revoke the *khul'a*.^{49t} A separation by *khul'a* amounts to an *irrevocable* divorce. Once a *khul'a* is validly effected the husband cannot revoke it. The wife can, however, reclaim ransom (consideration) during the period of her 'iddat, in which case the husband shall be entitled to revoke the *khul'a* (Al-Hilli : *Sharai'al-Islam*, Beirut, vol. ii, pp 71).

^{49a}Fatawa 'Alamgiriyyah, op. cit., vol. ii, p. 122.

^{49r}Al-Ramli, Muhammad b. Abi'l 'Abbas, *Nihayat al-Muhtaj*, Cairo, 1357, A.H., vol. vi, p. 399.

^{49s}Sharaf al-Din Musa al-Hijawai, *al-Iqna'*, Cairo, n.d. vol. iii, p. 260.

^{49t}Ibn 'Abidin: *Radd al-Muhtar*, op. cit. vol. ii, p. 575.

Section 138. *Khul'a*, in effect, amounts to one irrevocable Effect of *Khul'a* divorce. The parties may, however, remarry, if they so choose, even during the term of probation, ('*iddat*') of the woman.

COMMENTARY

The marriage is dissolved as soon as *Khul'a* is granted or the proposal is agreed to by the other spouse. As soon as a release has been granted to by husband, the wife is completely separated from him, even though no compensation has been paid by then.

Nature of Separation :

Is *khul'a* a dissolution of Marriage (*faskh*) or a divorce ? There is difference of opinion among the jurists on this point.

Hanafi View: According to Hanafis, *Khul'a* is on all fours with an irrevocable divorce.⁵⁰ Burhān al-Din Marghinānī, the author of *al-Hidayah*, has said that the granting of *Khul'a* shall take effect as one irrevocable divorce and the wife shall have to compensate the husband.⁵¹

Māliki View : Under the Maliki law the dissolution of marriage by *Khul'a* constitutes an irrevocable divorce.^{51a}

Shōfi'i View : According to an earlier opinion of Al-Shāfi'i, *Khul'a* effects separation between the husband and wife. It does not take effect as a divorce. But according to the final pronouncement of Al-Shāfi'i, *khul'a* is one irrevocable divorce.^{51b}

Ahmad b. Hanbal's View : According to Ahmad b. Hanbal, *Khul'a* does not take effect as divorce provided the husband at the time of effecting it does not intend to pronounce divorce.⁵² It is written in *Baḥr al-Rā'iq* that according to Hanbalis separation "effected by *khul'a*" is dissolution, not divorce. Hence, according to them, by effecting *khul'a* no reduction in husband's right in the number of pronouncing divorces, should occur.^{52a}

⁵⁰Fatawa 'Alamgiriyyah, Kanpur, vol. ii, p. 118.

⁵¹Al-Marghinānī: *Al-Hidayah*, Karachi, vol. ii, p. 404.

^{51a}Ibn Qudamah: *Al-Mughni*, op. cit., vol. vii, p. 59.

^{51b}Ibid.

⁵²Ibn Humām: *Fath al-Qadīr*, Cairo, 1356 A.H., vol. iii, p. 199.

^{52a}Ibn Nujaym: op. cit., *Dār al-Kutub*, Cairo, vol. iv, p. 71. Also see Ibn Qudamah: *Al-Mughni*, vol. vii, pp. 57-59.

Views of Ta'ūs & Dār Qutni : Ta'ūs and Dār Qutni too report the same view. It is stated by 'Abd al-Razzāq that if a person pronounced two divorces to his wife and then grants *Khul'a* to her, it shall not amount to pronouncement of the third divorce as *Khul'a* does not take effect as divorce. The husband may then contract re-marriage with his former wife without her being made lawful by an intervening consummated marriage.⁵³ This view is not correct and has not been adopted by any school of law.

Ibn al-Qayyim's View : Hāfiz Ibn al-Qayyim, discussing the question in his book, *Zād al-Ma'ād* writes that according to Ibn 'Abbās, 'Uthmān, Ibn 'Umar and Rabi', *Khul'a* is dissolution and not divorce. Imām Aḥmad reports from Ibn 'Abbās through Yahyā b. Sa'id Sufyān, Amrū and Ta'ūs that *Khul'a* is dissolution and not divorce.⁵⁴ Besides, 'Abd al-Razzāq also, on the authority of Sufyān, 'Amru and Ta'ūs, has reported that Ibrahim b. Said asked Ibn 'Abbās about a person who had pronounced two divorces to his wife and she thereafter had obtained *Khul'a* from him, whether he could remarry that woman. Ibn Abbas replied, "Yes".

Hāfiz Ibn Qayyim clarifying the distinction between 'Divorce and *Khul'a*' writes further that there are three distinguishing features of divorce and *Khul'a*. The first is that the husband is entitled, after pronouncement of divorce, to have recourse to his wife, whereas in *Khul'a* there is no right of having recourse to. Secondly, divorce can be pronounced upto three in number, whereas *Khul'a* is not included in the number of divorces. The third difference is that the term of probation after a divorce is three courses of menstruation as is established from *Sunnah* of the Holy Prophet and the statements of his Companions. On the other hand, the term of probation after *Khul'a* is one course of menstruation^{54a} as is established from the traditions of the Prophet and the assertions of his Companions. Hāfiz Ibn al-Qayyim has also referred to the report of the Companions of the Prophet and their successors. He said that Ibn Jurayj said that he was informed by 'Amru b. Dinār that he heard 'Ikrama, the freed slave of Ibn 'Abbās, reporting from Ibn 'Abbās who said, "The thing which the property has made lawful is not a divorce."⁵⁵ Besides, Ibn Jurayj reports from Tā'ūs the narrative: "Thy (Ibn Jurayj's) father did not see divorce in *fidyah* (ransom)". That is to say, he did not accept *Khul'a* effected in consideration of property as divorce."⁵⁶

⁵³Ibn Humām : *Fath al-Qadīr*, Cairo 1356 A.H., vol. iii, p. 200.

⁵⁴ الخلع تفريق وليس به طلاق

^{54a}This view is incorrect. For detail see Chap. on 'Iddat' *infra*.

⁵⁵ ما اجازه المال فليس بطلاق

⁵⁶Ibn Qayyim: *Zād al-Ma'ād*, Cairo, 1369 A.H., vol. ii, pp. 35-36.

Criticism :

By holding *Khul'a* to be *faskh* (dissolution) of marriage, the point of view about recontracting marriage with one's own wife who was earlier pronounced two divorces and then separated by *Khul'a*, without an intervening consummated marriage, appears to be misconceived. The jurists who do not consider *Khul'a* as divorce but consider it as *faskh* take it out from the category of divorces and numbers. It shall thus amount to an addition over and above three divorces which is not established either by the Qur'ân or the Sunnah. *Khul'a*, being effective as an irrevocable divorce, the parties may, however, re-marry without any intervening marriage provided the wife, at the time of *Khul'a* was not undergoing the period of 'iddat of two revocable divorces. In such an event, the two divorces earlier pronounced to the wife who was then separated by *Khul'a* make it unlawful for her to re-marry the same husband, without an intervening consummated marriage, as the *Khul'a* being in the order of divorce, the maximum number of three divorces stood exhausted.

According to some of the theologians a revocable divorce takes effect by the pronouncement of *Khul'a*. The husband according to them, after effecting *Khul'a* to his wife, may have recourse to her during her observance of the term of probation. Indeed in the event of his having recourse to her he shall have to give back to her what he received from his wife as compensation for effecting *Khul'a*.⁵⁷ But the view of holding the *Khul'a* as revocable divorce is not correct.

The Correct View :

The correct view-point appears to be that *Khul'a* is an irrevocable divorce in its effect though not in its nature. The contract of marriage in a revocable divorce subsists till the term of probation terminates and the husband may have recourse to her during the continuance of her term of probation. Whereas in *Khul'a* against compensation, the intention is to secure complete separation from the husband. Complete separation implicit in *Khul'a* against compensation is in effect an irrevocable divorce. The husband in "*Khul'a* with compensation" cannot have recourse to. The wife pays the compensation so that she may have complete mastery over herself. This can only happen when she obtains irrevocable divorce⁵⁸ (and the right of having recourse to is completely eliminated).

This point of view is also supported by a narrative reported by Mālik. 'Umm Bakr Aslamīyah obtained *Khul'a* from her husband (by consent).

⁵⁷Ibn Humām: op. cit. vol. iii, p. 200.

⁵⁸Mawlāna Syed Amīr 'Alī: (d. 1938 A.D.), '*Ayn al-Hidayah*, Lucknow, vol. ii, p. 270; *Bada'i' al-Sanā'i'*, Cairo, 1328 A.H., vol. iii, p. 145.

They both took their case to Caliph 'Uthman who held it to be an irrevocable divorce.⁵⁹ Besides, to support this view there is an assertion of Ibn Mas'ūd as well. He said that irrevocable divorce is effected in two ways only: One, by accepting compensation, and the other by 'Ila' (i.e. by abstention from sexual intercourse for the period of not less than four months pursuant to a vow). Similar is a report from 'Ali. Ibn al-Musayyib too narrates that the Prophet held *khul'a* to be a divorce.⁶⁰

Muhammad al-Shaybānī in his book "*Muwaṭṭā'*" has stated that *khul'a* is a single irrevocable divorce except where three divorces are intended or expressed thereby⁶¹. Same is the opinion of 'Uthmān, 'Ali, Ibn Mas'ūd, Ibn 'Abbās, Hasan al-Baṣrī, Sa'īd Ibn al-Masayyib, 'Ata, Shūrayh, 'Āmir, Shā'bi, Mujāhid, Abū Salama, Ibrahim Nakh'ī, Zuhri, Awzā'ī, Sufyān Thawri, Abū Hanifah, Mālik and Shaf'ī.⁶²

The author of Hidayah has said in this connection: "The best argument on this question is the tradition regarding Thābit b. Qays, in which the Prophet by saying "*Khall-i-Sabilaha*" (do let her off) ordered him to let the woman go. This is the proof of the divorce by *khul'a* being irrevocable.⁶³ Hence the majority of the theologians agree on the point that *khul'a* comes under the category of a single irrevocable divorce.⁶⁴

Pakistan Law :

Remarriage after Khul'a, no intermediate marriage of woman with another male necessary : The marrying by another husband, before a woman can be lawful to her previous husband, is a condition which has been imposed only in the case of a divorce (pronounced thrice) and not in that of *khul'a*. No such fetter has been placed on the reuniting of a woman who has obtained dissolution of her marriage in the *Khul'a* from. [PLD 1970 Lah. 1—PLR 1970 (2) W. P. 894—Law Notes 1969 Lah. 387]. (This was a case where two divorces earlier to *khul'a* had not been pronounced by the husband).

⁵⁹ Al-Shaybānī: *Muwaṭṭā'*, Karachi, p. 253; Ibn Humām, op. cit., vol. iii, p. 201; Al-Bayhaqī: *Al-Sunan*, vol. vii, p. 316.

⁶⁰ Ibn Humām: op. cit., vol. iii, p. 201:

”لا تكون طليقة بائنة الا في فدية او ايلاء“

⁶¹ Al-Shaybānī: op. cit. p. 253.

⁶² Mawlāna Syed Amīr 'Alī, op. cit., vol. ii, p. 270.

⁶³ Ibid.

⁶⁴ Ibn Nujaym: *Baḥr al-Rā'iq*, Dār al-Kutub al-'Arabiyah, Cairo, vol. iv, p. 71.

Section 139. When the husband and wife, with mutual consent and desire, obtain release and freedom from their married state it is called '*Mubārāt*'. It takes effect as one irrevocable divorce without the aid of the Court.

COMMENTARY

The literal meaning of the word, *Mubārāt* is obtaining release from each other. The proposal, in *Mubārāt*, may be made by either of the two, the husband or the wife and with its acceptance by the other, marriage is completely dissolved. No Qāḍī (Judge) is required to pass any decree for the same.

Sunni Law : *Mubārāt*, as a matter of fact, is a mutual agreement of the husband and wife that becomes effective by the consent of the parties. Hence, if the married couple for some reason mutually agree to annul their marriage contract, they are, without the intervention of court, entitled to do so. *Mubārāt* with respect to its effect, like *Khul'a*, is one irrevocable divorce. (Ibn Nujaym: *Bahr al-Rā'iq*, Dār al-Kutub Al-'Arabiyah, Cairo, vol. iv, p. 71).

Shī'i Law : *Mubārāt* is similar to a *khul'a*, the only difference is that in *Khul'a* it is only the wife who bears aversion for the husband but in *Mubārāt* the aversion is mutual. In *Mubarat* it is not lawful for the husband to take from the wife consideration greater than the dower paid by him. It is necessary in case of *Mubārāt* to indicate a separation between the two by the use of some word which indicates divorce. It shall also amount to an irrevocable divorce. (Al-Hilli: *Shara'i' al-Islam*, Beirut, vol. ii, p. 72).

Pakistan Law :

When both the husband and the wife feel an aversion for each other, and they dissolve their marriage by agreement, it is called *Mubārāt*. (PLD 1967 Supreme Court 97).

Distinction between 'khul'a, and 'Mubārāt : *Mubārāt* like *khul'a* is a dissolution of marriage by agreement; the difference between them is that when the aversion is on the side of the wife and she gives the husband consideration for the separation the transaction is called *Khul'a*. When the aversion is mutual and both parties desire separation, the transaction is called *Mubārāt*. (PLD 1967 S. C. 97—PLD 1964 S. C. 456—16 DLR S. C. 389). The offer of separation in *Mubārāt* may proceed either from the wife or from the husband and as soon as it is accepted the dissolution is

complete. (PLD 1952 Lah. 113). In such a case no reference to Court is necessary and the matter is settled by an agreement between the parties. (PLD 1967 S. C. 97).

Where a suit filed by the husband for restitution of conjugal rights has been decreed but as against that the wife's suit claiming dissolution of marriage had been dismissed by the trial Court, it was held that it was the wife who sought severance of the marital tie and not the husband and, therefore, in the circumstances the divorce ultimately agreed upon by the parties was not *Mubārāt* but *khul'a*. (PLD 1964 S. C. 456—16 DLR S. C. 389).

Modern Legislation :

In Pakistan, section 7 of the Muslim Family Laws Ordinance, 1961 provides for notice of *talāq* to be given by the husband to the Chairman, Union Council with a copy thereof to the wife. Section 8 of the Ordinance makes the provisions of section 7 applicable *Mutatis mutandis* to dissolution of marriage otherwise than by *talāq*.

The question, however, is whether a divorce by *Khul'a* or *Mubārāt*, without any notice given to the Chairman, as contemplated by section 7 of the Muslim Family Laws Ordinance, is effective or not? According to Lahore Bench in the case of *Mohammad Ishaq vs. Ahmad Hasan* (PLD 1975 Lahore 1118), notice seems to be necessary whereas according to Karachi Bench in the case of *Parween Chaudhry* reported (PLD 1976 Karachi 416), "absence of notice does not effect the validity of divorce." The same rule, according to the present writer, may apply to divorce by *khul'a* and *Mubārāt*.

N. J. Coulson, a well known English writer on Islamic law has also dealt with this aspect of Pakistan Family Laws Ordinance. He writes, "Under the Pakistan Muslim Family Laws Ordinance, 1961, a husband is required to give written notice of his having pronounced a *talāq* both to his wife and to the Chairman of the Arbitration Council set up under the Ordinance. A *talāq* pronounced "in any form whatsoever" will not be absolute until ninety days after delivery of written notice to the Chairman, or where the repudiated wife is pregnant, until delivery of the child, whichever period be longer. It seems, therefore, that even if a husband gives notice of a third repudiation, this will no longer constitute an immediate and final divorce. Furthermore, the same procedure is to apply "where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talāq*". This clearly covers the case of extra-judicial divorce by mutual agreement, which will accordingly no longer constitute a final and irrevocable divorce, as it does under traditional *Sharī'ah* law. On the other

hand, where a husband does not give the requisite notice of his *talāq*, or the spouses do not give notice of "divorce by agreement", the divorce will apparently be valid and effective under the terms of traditional *Shari'ah* law, since the sanction for failure to comply with the provisions of the Ordinance is purely punitive—the offender being liable to imprisonment for a term of upto one year, or a fine of upto 5,000 rupees, or both."^{64a}

Suggestions :

1. To the present writer, the requirement of notice in cases of divorce by *Khul'a* and *Mubārāt* seems to be superfluous in as much as the dissolution of marriage, in these cases, is not the result of a unilateral act of the husband, and further, the *Khul'a* and *Mubārāt* effect an irrevocable divorce, wherein no *raj'at* is provided. The spouses may, however, contract their marriage afresh, if they so desire.

2. In view of conflicting opinions on the point of the validity of divorce for want of notice, between the Lahore High Court and the High Court of Sind as referred to above it is deemed expedient that the position be clarified by making an amendment in Sections 7 and 8 of Pakistan Ordinance No. 8 of 1961 that the absence of the notice or of the proceedings before Arbitration Council, as contemplated by Sections 7 and 8, will not affect the validity of *Talāq* including *Khul'a* and *Mubārāt*, if otherwise valid under the *Shari'ah*. Further, a provision relating to irrevocability of divorce in matters of *Khul'a* and *Mubārāt* be also added, as according to all schools of Muslim Law as well as the laws in force in various Muslim countries the divorce by *Khul'ā* or *Mubārāt* is irrevocable.

3. Furthermore, it seems that provisions of Sections 7 and 8 of the above Ordinance relating to revocability of divorce apply even to a case of third divorce and do not regard it as irrevocable, although under the *Shari'ah*, it is *bā'in mughallizah*, wherein no recourse by the husband or even re-marriage between the couple can take place, without an intervening marriage, as is evident from the Qur'anic text (ii : 229), Prophetic *Sunnah*, *ijma'* of the *Shībah* and the practice of the *Ummah*, throughout these fourteen hundred years. An amendment in the said provision of law by way of clarification will be most suitable.

Section 140. (1) Whatever rights, not being financial, are created between the married couple because of the marriage contract shall stand annulled by the *Khul'a* effected between the parties.

Effect of *Khul'a* and *Mubarat* on dower and maintenance

^{64a}Coulson: Succession in the Muslim Family, Cambridge 1971, p. 21.

(2) In the absence of any contract to the contrary, all the rights that are created between the married couple because of marriage contract, shall stand annulled on a *Mubārāt* being effected.

Explanation : The wife's dower (if not paid) and the maintenance allowance for the period of her probation, on account of *Khul'a* being effected, shall not be annulled except when there is some agreement to the contrary between the husband and wife.

Provided that, notwithstanding any agreement to the contrary, the house in which the wife resides at the time of *Khul'a* or *Mubārāt*, her right of residence therein shall continue during the term of probation at the cost of the husband.

COMMENTARY

The effects of *Khul'a* and *Mubārāt* are that whatever rights are created, between the husband and the wife on account of marriage contract, lapse and the couple is exonerated from obligations owing to each other⁶⁵. It is said in *Khulāsatul Fatāwā* that they are not liable to be so exonerated if divorce is effected for consideration.⁶⁶ Al-Kāsānī is of opinion that *Khul'a* effected for compensation resembles divorce effected for consideration and it is an established rule that the rights of a person do not lapse unless they are made to lapse by him. Hence only those rights shall lapse in *Khul'a* that are mentioned in (the agreement of) *Khul'a* but all those debts which are not due on account of marriage contract shall not lapse.⁶⁷

Ibn Nujaym writes in *Baḥr al-Rā'iq* : "If the husband tells his wife that he effects *Khul'a* to her and mentions nothing else and the wife does accept it, the *Khul'a* shall get effected making all the rights lapse. So is written in *Khulāsatul Fatāwā*"⁶⁸ The author of *Baḥr al-Rā'iq* further adds: "*Khul'a* like *Mubārāt* requires the couple's exoneration of obligations

⁶⁵Abdullāh b. Maḥmūd al-Nasafī: *Kanz al-Daqa'iq*, Dewband, p. 140.

⁶⁶*Fatawa 'Alamgiriyyah* : Kanpur, Vol. ii, p. 118; Ibn Nujaym: *Baḥr al-Rā'iq*, Cairo, 1311 A.H., vol. iv, p. 96.

⁶⁷Bada'i' al-Sanā'i', Cairo, 1328 A.H., vol. iii, p. 151.

⁶⁸Ibn Nujaym; op. cit., vol. iv, p. 70.

because *Khul'a* is separation. The separation shall not be a certainty unless all the existing rights against each other do become extinct.⁶⁹

Imām 'Ayni writes, "If the husband tells his wife that he effects *Khul'a* to her and does not mention compensation and the wife accepts it, the dower of the wife, according to *Zāhir al-Riwāyat*,⁷⁰ shall not lapse."

Hanafis view :

It is written in "*Al-Mukhtaṣar*" of *Al-Qudūrī* that according to Imam *Abū Ḥanīfah* the husband and the wife, in case *khul'a* or *Mubārāt* is effected, become exonerated from all the obligations created under the marriage contract.⁷¹ Indeed, the obligations due to reasons other than the marriage shall not lapse.

Al-Shaybānī's View : Muhammad *Al-Shaybānī* does not agree with *Abū Ḥanīfah* on this point. According to him the rights, without being mentioned, cannot lapse. According to him, therefore, in *khul'a* or *Mubārāt* in either case, all the rights under marriage contract unless expressly mentioned by both shall not lapse,

Abū Yūsuf's View : Imām *Abū Yūsuf* agrees with Imām *Muḥammad* in the case of *khul'ā*; that is to say, according to him as well, in the case of *Khul'a*, the rights without being specifically mentioned cannot lapse. But he agrees with *Abū Ḥanīfah* in the case of *Mubārāt*. The rights, in the case of divorce by *Mubārāt*, that are created between the couple under the marriage contract do lapse.

Contentions :

Muḥammad Al-Shaybānī argues that *Khul'a* or *Mubārāt* is a contract for consideration or a contract with compensation. In contracts the terms settled shall be adhered to. No credence shall be given beyond that. Hence the right that is not proved as lapsed under the terms of the contract cannot lapse. *Abū Yūsuf* however, advances the argument that *Mubārāt* means the exoneration of both the parties from the mutual obligations under marriage contract. The exoneration of the parties includes the exoneration of the husband from the rights of the wife and of the wife from the rights of the husband. But the case of *Khul'a* is

⁶⁹Ibid, p. 87.

⁷⁰*Zāhir al-Riwāyat* is the collective name of six books of *fiqh* of *Muḥammad al-Shaybānī*, viz. *Al-Mabsūt*, *Al-Siyar al-Saghīr*, *Al-Siyar al-Kabīr*, *Al-Jamī' al-Saghīr*, *Al-Jamī' al-Kabīr* and *Al-Ziyādāt*.

⁷¹*Al-Qudūrī: Al-Mukhtaṣar*, *Qur'ān Mahal*, Karachi, p. 165.

different from that of *Mubārāt*. *Khul'a* demands separation. Therein, there is no exoneration from the obligations. In other words, *khul'a* implies termination of the marriage contract whereas *Mubārāt* demands the exoneration from obligations (and rights) under marriage contract. The argument advanced on behalf of Abū Ḥanifah is that *khul'a* means separation and it is as absolute as *Mubārāt*. Hence, both in case of *khul'a* and *Mubārāt* the same effect shall follow regarding the rights under marriage contract.⁷² That is to say, absolute repudiation and exoneration shall be the consequence in respect of all the rights and obligations established on account of the marriage contract.

Analysis :

As it is evident from the above, there is difference amongst the Hanafi *A'immaḥ* regarding the effects and consequences of *khul'a*. According to Abū Ḥanifah, on *khul'a* being effected all the financial rights, that are incumbent on each other because of their marriage contract, cease spontaneously. For instance, if the dower or the maintenance allowance of the wife is due on the husband it shall lapse after *khul'a* is effected. The wife can make no demand for the same. Similarly, if the husband has paid in advance the maintenance allowance for a year to the wife and after the expiry of six months, *khul'a* is effected between them, the husband cannot take back from the wife the maintenance allowance paid for the unexpired period. According to Ṣāhibayn (Abū Yūsuf and Muḥammad) the financial rights of the couple do not lapse by *khul'a* unless it is clearly mentioned. This difference is not based on Traditions; rather it is based on Qiyās. None of the jurists has produced any Qur'ānic verse or any tradition in support of their contentions.

One of the arguments of Imam Abū Ḥanifah is that the literal meaning of the word "*Khul'a*" demands that when the parties effect *Khul'a*, their marriage relationship and all the rights and obligations owing to that marriage should totally cease, because *khul'a* literally means taking off, such as clothes or shoes from one's body. When a person effects *khul'a* to his wife he, in fact, completely separates from her and puts her out of the marriage contract and relationship. This sense can only be completed when all the rights and obligations that are created between the couple in pursuance of the marriage contract are put to an end. Abū Ḥanifah thus contends that *Khul'a* is effected with the intention of ending the disputes that arise between the couple due to the wife's contrariness. This purpose is served completely only when alongwith marriage relationship all the

⁷²Mawlānā Syed Amīr 'Alī: Ayn al-Hidayah, Lucknow, vol. ii, pp. 276-77.

rights and obligations, too, that are established through that relationship and figure as its features are put to an end. In other words, *Khul'a* demands that whatever financial rights exist between the couple owing to their marriage contract, all of them, should lapse and be put an end to, because the continuance of the same shall keep the cause of dispute alive and the purpose shall not be served.

One of the contentions of Muḥammad al-Shaybōni is that the effecting of *Khul'a* is, in fact, like that of pronouncing divorce for consideration. It is a settled point that on pronouncing divorce for consideration the couple's other rights based on marriage contract do not lapse. Hence, the presumption is that the same shall also not lapse in case of *Khul'a*. His other contention is that *Khul'a* is, in fact, an agreement for the cancellation of marriage contract. It is a rule that only those matters that are mentioned in the agreement are given effect to. In *Khul'a* only the compensation for the same is mentioned and no other rights of the couple are mentioned. Hence the rights that are not mentioned shall not lapse.

The first contention of Muḥammad has been answered on behalf of Abū Ḥanifah that though there is some resemblance between divorce for consideration and *Khul'a* but they do substantially differ. The two cannot in all respects be deemed analogous. Imam Muḥammad himself, in some matters, recognises the difference between "*Khul'a*" and "divorce for consideration", *tōlaq 'alal māl*.

The second contention of Imām Muḥammad has been met thus : That the matter of *Khul'a* is not like that of a general agreement. The husband, who is a party to this agreement, has no right of its cancellation or having recourse to, as it is open to each party in other agreements. It is not correct to apply all the incidents and consequences of a general agreement to it. Besides, even if it is admitted to be a general agreement, the rights under discussion, though not clearly mentioned, are implicitly included in such an agreement. *Khul'a* purports to imply that the matters of difference regarding marriage contract and marriage relationship stand settled. Hence considering that all other rights between them have also lapsed shall not be contrary to the terms of agreement. Indeed it would have been contrary to the spirit of the agreement if other rights and obligations are excluded even implicitly.

Liability of Dower :

It has already been observed that any lawful object can form the consideration for *Khul'a*. Hence, it is open to agree to *Khul'a* on the

condition that the wife surrenders her dower as consideration for *Khul'a*. In such a case the marriage shall be dissolved while the wife shall lose her right to the dower. It can, however, be made an express condition of *Khul'a* that the wife's dower or a portion thereof shall remain payable by the husband. There is a difference of opinion amongst Hanafi jurists about the husband's liability for payment of the wife's dower and the wife's liability for its return if it has already been paid to her.

Qāḍī Khān, an eminent jurist and Qāḍī of Damascus in his *Fatawa*^{72a} states that if the spouses settle consideration other than dower and no mention has been made about the dower, the following results will follow in a *Khul'a* with regard to the wife's dower :

- (a) If the marriage has been consummated and the whole dower has been paid to the wife, she shall be entitled to retain it according to the unanimous view of Abū Hanifah, Muḥammad and Abū Yusuf. The husband will get only the consideration agreed upon. But if the dower has not been paid to her, then, according to Abu Hanifah, she is not entitled to claim the dower because, according to him, *Khul'a* puts an end to all the rights, which the spouses have against each other except the wife's maintenance and residence during her *'iddat*, but according to Abū Yusuf and Muḥammad the wife shall be entitled to claim it from her husband because the dower is firmly established if the marriage has been consummated. (الدخول يمتا كد المهر)
- (b) If the marriage has not been consummated and the whole dower has been paid to her, then according to Abū Hanifah the husband will not be entitled to the return of any portion of the dower. He shall, of course, take the consideration that may have been agreed upon. But, according to his two disciples, the wife shall have to return half the dower to the husband and will be entitled to keep half of it with herself.
- (c) If the marriage has not been consummated and dower has not been paid to her, then according to Abū Hanifah no amount of the dower shall be due to her. She shall not be entitled to get her dower or any portion thereof from her husband. She shall pay to him the consideration agreed upon. According to Abū

^{72a}Qāḍī Khān: *Fatāwa*, op. cit., vol. ii, p. 256.

Yusuf and Muḥammad, the wife shall be entitled to get half of the dower from the husband. The consideration agreed upon has, of course, to be paid by the wife to the husband in each case.

If the husband divorces his wife by *Khul'a* in consideration of her dower and in case the marriage has been consummated and the whole dower has been paid to the wife, then the husband shall be entitled to its return by the wife. If it has not yet been paid to her, there are two opinions expressed by Hanafi jurists in this respect. According to one, the same rules shall apply as held by Abu Hanifah regarding dower in *Khul'a*. But, according to the second opinion, which is generally believed to be correct, the same rule shall apply as laid down by Muḥammad and Abū Yusuf.

Māliki Law : According to the Māliki law if the marriage has not been consummated and the parties settle *Khul'a* for a specified consideration, the wife shall have to pay the specified consideration and her right to her dower shall be extinguished. She shall not be entitled to get the whole or any portion of it.

Shāfi'ī & Hanbali Laws: According to Shāfi'ī law if the spouses agree to a *Khul'a* for a particular consideration and the marriage has not been consummated, the wife shall be entitled to half the dower. In the whole dower has been paid to her, she shall have to return half of it. If it has not been paid to her, the husband has to pay half the dower to her. Aḥmad b. Ḥanbal holds that the right to dower is not lost in consequence of a *khul'a* and the husband remaining liable for its payment if the same has not already been paid to the wife, (if not otherwise agreed upon).

An Egyptian scholar, Dr. Muhammad Yūsuf Mūsa, in his book, *Aḥkam al-Shakhsyah fil fiqh al-Islami*⁷³ writes that there is authoritative verdict supporting the opinion of Imam Abū Ḥanīfah. The rights (financial or otherwise) of the couple established on account of marriage contract shall, if not specified in both *khula'* as well as *Mubārāt* agreement, stand lapsed.

Conclusion :

On examining the various contentions, the present writer finds the opinion of Ṣāhibayn (Imam Abū Yūsuf and Muḥammad) in the matter of *khul'a* more weightly and acceptable and the opinion of ShayḲhayn (Imam Abū Hanifah and Imam Abū Yūsuf) on the question of *Mubārāt* appears

^{72b}Saḥnūn, *al-Mudawwanat al-Kubrā*, Cairo, 1323, A. H. vol. v, p. 21.

^{72c}Ibn Qudamah : *Al-Mughni* op. cit., vol. vii, p. 56.

⁷³Published in Cairo, 1958, p. 308.

to be more correct. In other words, only the non-financial commitments that are established on account of marriage contract shall automatically lapse on *khul'a*, but the husband shall not be exonerated of the liability of the financial rights such as dower and maintenance except when the wife agrees to it at the time of *khul'a* being effected. Then, in the case of *Mubārāt* the husband and the wife shall be deemed to be exonerated of the entire financial or non-financial commitments that exist during the subsistence of marriage between them, except when there is an agreement to the contrary. It is written by Ibn al-ʿĀbidin that there is a majority verdict on the opinion of Imam Abū Yusuf on this question; and this point of view appears to be more reasonable.

Maintenance during period of Probation :

As regards the wife's right of maintenance during period of probation (*ʿiddat*), it does not lapse in *khul'a* or *mubārāt* unless agreed upon, as it is a right which accrues only on separation, not before.

Residence of the wife :

Indeed so far as the right of residence of the wife during probation period is concerned, it cannot be given up even by mutual agreement. This is a religious obligation ordained by God by saying, "Do not turn them out from their houses (LXV : I). He has decreed not to turn the divorced wife out of the house so that she, in pursuance of the religious directive may, as of right pass her period of probation there. This rule on social grounds too is highly commendable.

Section 141. It is not lawful for the husband to grant *Khul'a* to Khul'a in lieu of his wife in consideration of her surrendering the children's custody custody of her minor children to him. In case the *Khul'a* is granted on the abovesaid condition, the *Khul'a* shall take effect but the condition shall be void.

COMMENTARY

Under the *Sunnī* law, the mother, generally speaking, is entitled to keep her minor son in her custody till he is seven years old and the daughter till she attains puberty. Under the *Shi'ah* law, however, the son remains in the legal custody of her mother upto the age of two years. This rule is meant for the benefit of the children and it is considered that the mother is most suited to look after them till they reach the prescribed ages. It is, therefore, not open to the husband to give *Khul'a* on the condition that the wife shall surrender the custody of the children to him before their attaining the prescribed ages. She cannot, therefore, surrender her right of the custody

of the children as consideration for *Khul'a*. Such an act is considered detrimental to the interests of the children and so is not permissible. Hence, if the husband grants her *Khul'a* on the condition that she should surrender the custody of the children to him, this condition shall be void and the children shall remain with their mother but the *Khul'a* shall be effected⁷⁴.

This rule is, further, based on two considerations namely, (i) the right of custody of children is not transferable, and (ii) the right of custody is not a *māl*, financial in nature. Thus, it can not form a valid consideration for *Khul'a*.

Similarly, a condition by a wife undertaking to bring up her son after the period when he should be given in the custody of the father shall not be deemed to be valid. This rule is based on the view that it is necessary in the case of a son that he should be trained for his father and that the mother is not capable of doing so. This cannot be the case with respect to a girl and so an agreement to bring her up even after the prescribed age shall be valid.⁷⁵

Section 142. It is lawful for the husband to grant *Khul'a* or *Khul'a* or *Mubārāt* on children's maintenance have *Mubārāt* in lieu of his wife's relinquishing to him his children's maintenance; Provided that the relinquishment is for a fixed period and the wife has got sufficient means to maintain them.

COMMENTARY

It is lawful for the spouses to agree to *Khul'a* or *Mubārāt* on the condition that the wife shall be responsible to maintain a child or children, as the case may be, born of the marriage, during the period when the child is a minor. But it is a necessary condition of such agreement that the period during which the wife is made responsible for their maintenance should be specified. If the period has not been specified, the condition shall not be valid and the wife shall not be responsible for the maintenance of the minors. There is, however, an exception to this rule. In case of an infant if no period is specified the condition shall not be invalid because it is presumed that she has to suckle the child for the usual period of two years.⁷⁶

⁷⁴*Fatawa Alamgiriyyah*, op. cit., vol. ii, p. 119.

⁷⁵*Fatawa 'Alamgiriyyah*, op. cit., vol. ii, p. 119 ; Ibn 'Ābidin, op. cit., vol. ii, p. 583.

⁷⁶*Fatawa Alamgiriyyah*, op. cit. volume ii, page 119.

It is stated in *Minḥatul Khōliq* that if a wife obtains *Khul'a* on renunciation of her right to claim maintenance of his child aged ten years, when she herself is poor and unable to bear his maintenance expenses, she is entitled to claim his maintenance from the husband. The basis of the rule is that the consideration for *Khul'a* is a debt against her, and the maintenance of her child cannot be set off against her own debt. It has further been stated that the *fatwa* (verdict) of other *jurisconsults* about the extinguishment of the maintenance is not to be relied upon.⁷⁷

The underlying principle in the above statement of law appears to be that the condition of releasing the father from the responsibility of maintaining his children and resting it with the mother is valid only in a case when the mother has means to support the minor children. In case, she is not affluent and does not have sufficient means to provide adequate maintenance to the minor children, the condition shall be invalid and it will not be open for the father to take up the plea that, under an agreement for *Khul'a*, the responsibility of maintaining the children rests with the mother. In that case, the father is bound to maintain his minor children both legally and morally.

⁷⁷Muhammad Amīn: *Minḥatul Khaliq*, (on the margin of *Baḥr al Rā'iq*.) op. cit., vol. iv, p. 89.

CHAPTER XVIII

Separation on Account of Disease and Defect

Section 143. A wife shall be entitled to obtain a decree of dissolution of marriage from a court in case the husband suffers from such a venereal or infectious disease or organic or physical defect that prevents him from having sexual intercourse or causes such an aversion in the mind of the wife that conjugal intimacy between them becomes impossible.

Separation due to husband's disease or defect

COMMENTARY

There are, in Islamic *Shari'ah*, three schools of thought, as noted below, governing the right of the wife to sue for dissolution of marriage on the ground of organic or physical defect and disease of the husband.

Hanafi Law :

The Hanafis say, if the wife finds in her husband such a physical defect or disease that prevents him from having sexual intercourse with her she shall be entitled to get the marriage with him dissolved. The husband, however, has no such right unless he has made it a condition of the marriage contract that the wife be free of such disease or defect. In such event the husband, because of disease or defect in the wife, can repudiate the marriage contract.

Maliki, Shafi'i & Hanbali Laws :

The three *A'imma*h and the majority of jurists hold that each of the couple, when he or she finds certain defect in the other, is entitled to demand separation. However there is difference amongst the three *A'imma*h and the other jurists on the kinds and number of defects on the basis of which each of the couple is entitled to separation.

Zahiriyyah's View :

The Zāhiriyyah say that none of the couple is entitled to annul the marriage even though the defect is either venereal, infectious or abhorrent. Hence Imam Abū Muḥammad Ibn Ḥazm writes in his book "*Al-Muhallā*",

“If the husband is not capable of having sexual intercourse (with his wife), even once, the ruler (Qadi) or any one else has no authority to get the separation effected between the couple”.¹

Ibn Ḥazm in support of his contention quotes the tradition respecting Rafā‘at al-Qurẓi that has been reported by Zuhri from ‘Urwah b. Al-Zubayr. It is to the effect that Hadrat Aishah informed ‘Urwah b. Al-Zubayr that Rafā‘at al-Qurẓi divorced his wife. The wife then got herself contracted in marriage with ‘Abd al-Rahman b. al-Zubayr. Thereafter she came to the Prophet and said, “O’ Prophet ! I was married to Rafā‘ah; he divorced me. I, then, got myself married to ‘Abd al-Rahman b. al-Zubayr and he has nothing except like frill (of linen)”, and showed him (to indicate ‘Abd al-Rahman’s male organ) the border of her coverlet in her hand. The Prophet smiled and said, “Probably you desire to get back to Rafa‘ah. That is not possible till you do not taste his (Abd al-Rahman b. al-Zubayr’s) honey and he that of yours”, that is, till you both do not derive sexual pleasure from each other’s company, (do not have sexual intercourse).

Ibn Ḥazm says that the tradition makes it clear that the husband (‘Abd al-Rahman) had not had sexual intercourse with the wife and his sexual organ was like thread (defective in extreme). The wife had complained of this to the Prophet and desired separation yet the Prophet did not effect separation between them.

Misconception : There appears to be misconception in the mind of Ibn Ḥazm about the above narrative regarding Rafa‘at al-Qurẓi on the question of separation due to the husband’s impotency. The question really was not of obtaining separation from an impotent husband; rather it was of obtaining her divorce from him and getting back to her former husband (Rafa‘at) who had pronounced to her three irrevocable divorces. The Prophet obviously meant to say that till she did not have sexual intercourse with her second husband (after marriage) she could not again enter into marriage contract with her former husband. In fact, the tradition is the interpretation of the Qur’anic verse, “فلا تحل لها حتى تنكح زوجاً غيره” that the wife does not become lawful to her former husband till she had married and cohabited with another husband.” (ii : 238). This tradition interprets the above verse to the effect that not only a second marriage but also cohabitation with the second husband is essential before she can remarry her former husband.

This interpretation gets support from Imam Mālik as well, Imam Mālik says in his “*Muwatta’*” that Rafā‘ah, during the Prophet’s time, pronounced three divorces to his wife, Tamimah bt. Wahb. She thereafter

¹ Ibn Hazm (d. 456 A.H.): *Al-Muḥallā*, Cairo, 1352 A.H., vol. x, p. 109,

contracted marriage with 'Abd al-Rahman Ibn al-Zubayr. 'Abd al-Rahman remained inattentive to her and could not consummate the marriage and thus separated her. Rafā'ah intended to remarry Tamimah. The Prophet, thereupon, said to Tamimah bt. Whab, "you desire to have recourse to Rafā'ah. You cannot (do so) till you have not tasted his (second husband's) honey and he has not tasted that of yours." Besides the said clarification there is another narrative that 'Abd al-Rahman b. al-Zubayr contradicted the assertion of his wife regarding his impotency and ultimately it was proved that he was not impotent.

Hanafi's Argument :

According to the majority of the Hanafis, if the wife finds that her husband suffers from a venereal disease that hinders him in having sexual intercourse with her, she is entitled to seek separation from him through the court. Venereal disease includes impotency, amputated male organ or having no testicle.

Opinion of Imam Muhammad :

Imam Muhammad al-Shaybāni has added to the said list the madness, leprosy and leucocythaemia.² Imam Kāsāni quoting the ruling of Imam Muhammad has, therefore, written : "His being free of each of such defects, (as madness, leprosy and leucocythaemia) that makes the stay of the wife with her husband without harm to herself is an essential condition of the marriage contract, otherwise the marriage contract on that ground shall stand vitiated."³

It is said in "*Majma'al-Anhur*" that according to Shaykhayn i.e. Imām Abū Ḥanifah and Imām Abū Yusuf, the wife is not entitled to obtain separation on the ground of her husband suffering from madness, leprosy or leucocythaemia.⁴ However, Quhistani is quoted in "*al-Muntaqā*" as

²Ibn Nujaym: *Baḥr al-Rā'iq*, Matba' al-Ilmiyah, Cairo, vol. iii, p. 137:

"وان الاسام مجمداً خالف ابا حنيفة و ابا يوسف بالجذام والبرص والجنون، اذا كانت بالزوج فتخير المرأة"

³Al-Kasāni (d. 587 A.H.): *Badā'i' al-Sanā'i'*, Cairo, 1328 A.H., vol. ii, p. 327 :

"خلوه من كل عيب يمكنها المقام معه الا يضرب كالجنون و الجذام والبرص شرط لزوم النكاح حتى يفسخ به النكاح"

⁴Damād Āfandī (d. 1088 A.H.): *Majma' al-Anhur*, Cairo, 1369 A.H., vol. i, p. 463 :

"ولا خيار لها ان وجدت المرأة به اى بالزوج جنوناً او جذاماً او برصاً عند الشيعين خلافاً لحمد ولا خيار له اى للزوج لو وجدها اى بالمرأة ذلك"

reporting from Imām Muhammad : "The wife has an option (of getting a separation) in the case of madness and leprosy of her husband. She has also an option on account of every such defect which makes her union with the husband, without receiving harm to herself, impossible.⁵

Only the wife's option :

The basis of difference between the Shaykhayn (Imām Abū Ḥanifah and Imām Abū Yusuf) on one side and Imām Muhammad on the other is that the Shaykhayn are convinced of the option of separation only in such a venereal disease that hinders one in having sexual intercourse. According to Shaykhayn, therefore, the wife on the ground of the defects such as madness or leucocythaemia cannot be entitled to secure separation. The reason being that these defects or diseases are not basic impediments to sexual intercourse. However, there is no difference amongst the Hanafis on the point that it is only the wife who on the ground of such defects in her husband, is entitled to demand separation.

Imām Kāsānī in "*Bada'i' al-Ṣana'i'*" writes, "The wife is not entitled to pronounce divorce. Hence, to obviate the harm, the method of dissolution of marriage (through Court) has been established. If it is the husband, however, who finds his wife suffering from such venereal diseases that hinders him in having sexual intercourse with her, it is not lawful for him to effect separation (*faskh*). He should either keep on retaining the wife earning reward in the Hereafter or divorce her in the known way.⁶

This is confirmed by Imām Sharakhsī who in "*Al-mabsūṭ*" writes, "The husband has no right whatsoever to claim dissolution of the marriage contract in spite of the wife being a whore suffering from venereal diseases. He has only the right of either divorcing her or keep on retaining her in his marriage."⁷

Imam Zaylī, while discussing the right of the wife to demand separation from the husband on the ground that the husband's male organ is amputated or that he is impotent, writes, "There is consensus of opinion of the Companions on these two defects. These two diseases defeat the very purpose (satisfying the sexual urge and procreation of children) of a

⁵ *Al-Muḥīt*, MSS, No. 3488: Al-Azhar, Cairo:

"ولا سراة الخيار في الجنون والجذام وكل عيب لا يمكنها المقام معه الا بضرر"

It is also written in *Al-Dur al-Mumtaqā* that the assertion of Muḥammad Al-Shaybanī is *Muḍtarab*, i.e., conflicting in contents.

⁶ Al-Kasānī: op. cit., vol. ii, p. 327.

⁷ *Al-Sarakhsī* (d. 483 A.H.): *Al-Mabsūṭ*, Cairo, 1324 A.H., vol. v, p. 97.

marriage contract. Other defects, besides these two, do not defeat such purpose of marriage contract; rather they only interfere with it.”⁸

The Prophet has said, “You marry each other and procreate children”.^{8a} The main purpose of a marriage contract obviously is to procreate children and satisfy the carnal appetite. Hence if the sexual intercourse is not possible the purpose fails and if the wife demands separation it becomes incumbent upon the husband to grant such separation. If the husband refuses to effect divorce, the wife under the *Shari‘ah* is entitled to get the marriage dissolved through a court of law.

Schools of law other than the Hanafis :

According to Māliki, Shafi‘i, Hanbali, Zaidiyah and Ja‘rariyyah schools of *fiqh*, as against the Hanafi view, each of the married couple is entitled to get the marriage contract dissolved due to diseases and physical defects discussed above.⁹

Maliki Law :

Imām Mālik is convinced of the optional right of separation of each of the married couple because of four defects viz. leprosy, madness, leucocythaemia and impotency. Ibn Rushd in his book, “*Bidayatul Mujtahid*” writes that Mālikis have differed about the rationale on account of which they have limited the right of separation to only these four defects.¹⁰ It is said of some of the Māliki Jurists that according to them limiting the defects to the number of four only is in effect a directive based on no particular cause (*‘illat*). In other words, those who are convinced of the right of repudiating the marriage contract on account of only those four defects (leprosy, madness, leucocythaemia and impotency) and are opposed to the right of separation on any other ground, consider the same to be based on the revealed edict. Whereas the others advance arguments limiting the defects to the number of four because they consider that these defects are inconspicuous while other defects are visible. No right of separation can accrue, in their view, on the ground of visible defects. According to some, the defects that are hereditary ought to be held to give good ground for separation.

According to this writer, if the said argument be accepted as correct then every invisible disease may provide a ground for separation. Similarly,

⁸Al-Zayl‘ī (d. 743 A.H.) : *Tabyīn al-Ḥaqā’iq*, Matba‘ al-Amīriyah, Cairo, vol. iii, p. 25.

⁹*Al-Durr al-Muntaqā* (on margin of *Majma‘ al-Anhur*), op. cit., vol. i, p. 427.

¹⁰Ibn Rushd: *Bidāyat al-Mujtahid*, Cairo, 1379 A.H., vol. ii, pp. 50-51.

if heritable diseases are taken to be good grounds for separation then ugliness and colour of the skin as heritable disqualifications may also provide a basis for effecting separation between the couple. But the majority of jurists is not convinced of the right of separation accruing on such basis.

Allama Kharshi¹¹ has categorised the defects as of three kinds:—

(a) The defects that are found both in the husband and the wife:—

- (1) Madness, (2) Leprosy, (3) Leucocythaemia, (4) Passing of stool (by the husband or the wife) at the time of having sexual intercourse (*Ghariṭah*). (5) Homosexuality or being sexually inclined towards the same sex.

(b) The defects that are found only in the husband :—

- (1) Amputation of the male organ, (2) Deprivation of testicles, (3) Impotency, (4) Sexual allergy or aversion.

(c) The defects that are found only in the wife:—

1. Pad, (*Ritq*, Screen like). It is a muscular growth that is sometimes found covering the vulva and, in other cases, the womb. If the growth covers the vulva the husband cannot have sexual intercourse with the wife. If the same be situated above the womb the husband may have sexual intercourse but no pregnancy.
2. Pod (*Qarn*, literally, Horn). Sometimes a horn like growth, hard as a small bone, found in the woman's vagina.
3. 'Afl, (Growth of extra flesh on the private parts). It hinders having of sexual intercourse causing discomfort and difficulty in sexual intercourse and the wife's refusal from having any.
4. *Ifḍā*, the rupture of the partition between the vagina and anal passage due to excessive sexual intercourse.
5. *Bakhr* (Bad breath or body odours so repulsive as to make it impossible for the husband to even approach the wife.

Shafi'i Law :

What forms the basis of the right of separation on account of leprosy and leucocythaemia according to the followers of the Shafi'yyah sect is the

¹¹ *Sharḥ al-Kharshī* (on Khalīl's *Al-Mukhtār*), Cairo, 1317 A.H., vol. ii, p. 720.

infectiousness of those diseases that are passed from the husband to the issues. Shaykh Muhammad al-Sharbini al-Khatib, the author of "*Mughni al-Muhtaj*" has said that according to learned men and experienced physicians leprosy and leucocythaemia are largely infectious and are impediments to the having of sexual intercourse. No sensible person shall be inclined to have sexual intercourse with one who suffers from these diseases.¹²

It is written in "*Wajīz*"¹³ that in the event of leucocythaemia, leprosy or madness being found in any one of the married couple they have the right of annulling their marriage contract. The wife has the right of demanding separation on the ground of the husband's amputated male organ or of his being impotent and the husband has the right of annulling the marriage contract on the ground of the wife having vaginal growths impeding intercourse.

Hanbali Law :

Ibn Qudamah al-Maqdisi¹⁴ in his noted work "*Al-Mughni*" and Abdullah Ibn Miftah¹⁵ in his book, "*Almunzi' al-Mukhtar*" too have described such diseases and have spoken of the couple's right of dissolution of their marriage contract.

Ibn Qudamah al-Maqdisi has written in his noted book of Hanbali fiqh *Al-Mughni* that dissolution of the marriage contract has been restricted to these (four) defects because they stand in the way of achieving the purpose of marriage. Leprosy and leucocythaemia are extremely obnoxious. They appear injurious to a husband's mind. Amputation and vaginal growths prevent sexual intercourse while hydrosile diminishes pleasure from it.¹⁶

Ibn Taymiyah and Ibn al-Qayyim :

Imam Ibn Taymiyah¹⁷ and Hafiz Ibn al-Qayyim are convinced of the fact that all the defects that are impediments to full sexual pleasure can

¹² *Mughni al-Muhtaj*, vol. iii, p. 203.

¹³ Al-Ghazzali (d. 505 A.H.): *Al-Wajīz fi'l fiqh al-Shafi'i*, Cairo, vol. ii, p. 18.

¹⁴ Ibn Qudamah, al-Maqdisi: *Al-Mughni*, Cairo, 1347 A.H., vol. vii, p. 597.

¹⁵ Abdullāh b. Miftāh, Shaykh (d. 877 A.H.): *Al-Munzi' al-Mukhtār*, Cairo, vol. ii, p. 295.

¹⁶ Ibn Qudamah, al-Maqdisi: *Al-Mughni*, Cairo, 1347 A.H., vol. vii, p. 579.

¹⁷ Ibn Taymiyah (d. 728 A.H.): *Ikhtiyārāt al-Ilmiyah*, Cairo, vol. 131.

be made grounds of demanding separation. Ibn Taymiyah has written in “*Al-Ikhtiyarat al-Ilmiyah*” that the defect that impedes bodily enjoyment and deriving pleasure may be made the ground of separation. Ibn al-Qayyim too has said in “*Zād al-Ma‘ād*”¹⁸ that restricting defects by description and numbers is not correct. Being blind, dumb, lame; likewise being amputated of one or two hands or of one or two legs and having such defect that makes association obnoxious are defects that are included in the diseases that may be made the ground of separation. Hence, according to Ibn Taymiyah and Ibn Qayyim every defect, that makes living together impossible and makes love and affection between the couple unattainable, gives rise to the option (of separation).

Final View :

1. There is consensus of opinion among the Companions of the holy Prophet on the point that impotency and amputation of the penis (قطع الذكر) are those defects on account of which the wife has the option of separation in as much as those defects stand in the way of the realisation of the purposes of marriage contract.

2. One of the principles of the law of *Shari‘ah* is “To give or suffer no harm”.^{18a} Hence the husband’s retaining the wife inspite of his having no power to give the wife her lawful rights (sexual intercourse), tantamounts to his inflicting injury on her. The *Shari‘ah* law is for the purpose of fully realising human potential. Hence, the attainment of the wife’s happiness demands that she, in such circumstances, be given the right of demanding separation. Al-Kāsānī, accordingly, argues that in these two defects (impotency and amputated male organ) the right of the wife for the purposes of removing her injury gets established.

3. The holy Prophet (peace be on him) is reported to have contracted marriage with a woman of Bani Ghifar tribe. Then, while intending to have intercourse with her he noticed that she had marks of leucocythaemia on her sides. He then moved away from her and told her, “Put on your clothes”. Whatever the Prophet had given her he took back nothing from her. This is narrated by Imām Ahmad in his “*Musnad*”. In another version it is stated that the Prophet sent her back to her family (obviously taking back nothing from her).

Arguments are based on this narrative that when the Prophet noticed leucocythaemia on the body of the woman he sent her back to her family. Leucocythaemia obviously is a defect that is obnoxious to the people. On

¹⁸Ibn Qayyim (d. 751 A.H.): *Zād al-Ma‘ād*, Cairo, vol. iv, p. 43.

^{18a} “لا ضرر ولا ضرار في الاسلام”

the other hand, marriage is contracted for the purpose of creating love and affection between the married couple. Another argument may as well be advanced on the basis of this narrative. As the marriage contract was annulled by the Prophet on the ground of leucocythaemia, so may the marriage contract be annulled on the ground of each of such defects that create detestation and extreme abhorrence in the mind. The basis of the annulment of the marriage contract by the holy Prophet was abhorrence caused by leucocythaemia which is as well found in other defects, such as leprosy, madness, etc. They may too validly form the basis of the annulment of marriage contract.

4. The holy Prophet, (peace be on him), said, "Flee from a leper as you do from tiger". The annulment of marriage contract on the ground of leprosy, in practice, is fleeing. If one has no right of annulling the marriage contract on account of leprosy, application of the principle laid down by the tradition is not possible. This tradition has been narrated by Imām Bukhārī.

5. It is stated of the Caliph 'Umar that he saw a leper women making the circuit of the House of God (Holy Ka'bah). He said to her "O, slave of God! had your remained in your house, you would not have caused trouble to the people".

6. Ibn Taymiyah has recorded in his "Fataw"^{18b} that he (Hādrat 'Umar) forbade a leper, with whom he had business dealings, to enter Madina and sent to him the article sold outside Madina.

7. Ibn Ḥazm in his book, "Al-Muhalla"^{18c} has quoted the assertion of Imām Sh'abi that the person who finds in his wife leucocythaemia, madness, leprosy or growths shall have, in case of penetration to pay the dower of the wife. If he finds out the defect before penetration has taken place, he may, if he so chooses, retain her or send her away without entailing the consequences of divorce.

Analysis :

After a thorough study of the various view-points as discussed above the present writer comes to the conclusion that the view-point of Ibn Ḥazm to the effect that there is no option of separation on the ground of defect cannot be held to be correct. Alongwith the same, view-points of the jurists of Zaidiyyah and Ja'fariyyah sects and of Imām Ibn Taymiyah and Hafiz Ibn-al-Qayyim to the effect that on the ground of defects the husband too has the option of separation (as in preference to divorce) cannot as well be regarded to be correct. When he has the absolute right of pro-

^{18b}Vol. iv, p. 106.

^{18c}Pt. x, p. 110.

nouncing divorce, his having the optional right of annulling the marriage contract does not appear to be correct, except where the marriage is contracted with the express condition that the woman is free from all such defects. This writer also does not find himself in agreement with the view-point of Imām Abū Hanifah and Imām Abū Yusuf that the wife has the right of demanding separation only in case of the husband's male organ being amputated and of his being impotent. In this respect, this writer finds the opinions of Imām Muhammad al-Shaybani and Imām Ibn Taymiyah and of Hāfiz Ibn al-Qayyim based on beneficial ground, sound logic and juristic analogy as quite preferable. This is to the effect that any defect that makes the sexual intercourse impossible and becomes the cause of defeating the very purpose of marriage ought to provide good ground of demanding separation by the wife.

In fact, the fixing of the number of defects and diseases is useless. Instead, those causes ought to be taken into account because of which women have been given the right of claiming separation. As the number and nature of defects and diseases, described in the book of different school of *fiqh*, differ, it is unnecessary to determine them. Rather that disease or that defect has to be accepted as furnishing good ground for separation which annihilates the very purpose and object of marriage. The husband's being impotent or his male organ being amputated or his being castrated, according the consensus view of all the schools of *fiqh* except the Zāhirriyyah, gives a valid cause to the wife of demanding separation. The cause, in fact, is the husband's inability of having sexual intercourse. On this ground, it would not be improper to say that any disease that causes obstacles to sexual intercourse may be made a valid ground of separation.

Likewise, the apparent cause of the right of separation on the ground of leprosy and loucocythaemia is the infectious tendency of these diseases and the possibility of their passing from generation to generation. A wife of the mildest temperament, however, may feel abhorrence in having sexual intercourse with a husband suffering from such a disease. Hence, on the ground of such infectious diseases that have the tendency of passing from generation to generation because of which one feels disgusted and abhors having sexual intercourse and which hinders the attainment of the purposes of marriage, the wife ought to be given the right of separation.

Modern Legislation :

In various muslim countries specific laws have been enacted giving right to the wife of seeking separation through courts on the ground of husband's suffering from diseases as detailed below :—

Lebanon :

Section 119. When a healthy wife becomes aware of her husband's suffering from one of the sexual defects she has the right of taking her case before the Authority and demanding separation. If the wife herself suffers from one of those diseases or defects her case shall not be entertained. The wife, who in spite of the knowledge of the disease in her husband permits him to cohabit with her, shall not be entitled to claim separation from him later on.

Section 120. When the wife is aware of her husband's defect (except that of his being impotent) from before her marriage contract with him or acquiesces in the defect of her husband after her marriage contract with him her right of claiming separation from him shall lapse. But her knowledge of her husband being impotent prior to the marriage contract shall not make her optional right lapse.

Section 121. When under section 119 above the wife takes her case before the Authority and there it is found that the disease is incurable the Authority shall without delay get the separation effected between them. If the disease is found to be curable the Authority shall give one year's time. The time given shall be in accordance with the nature of the disease or in accordance with the period that the disease may take for recovery.

Section 122. When the wife, after her marriage contract, becomes aware of her husband suffering from such a disease as leprosy, leucocythæmia or syphilis so that her staying with him shall prove harmful to her, it would be lawful for her to approach the proper Authority and claim separation. The authority if it sees the prospect of the disease being cured he would postpone the separation for the period of one year. If the disease does not abate during that period and the husband does not consent to the pronouncement of divorce and the wife remains insistent on separation, separation shall be duly effected. Such separation, however, cannot be effected on the ground of the husband being blind or lame.

Section. 123. When the husband becomes insane after the marriage is contracted and the wife having approached the proper Authority prays for separation, the Authority shall postpone the separation for the period of one year. If the husband is not cured during that period and the wife remains insistent on separation, the Authority shall pass a decree for separation.

Section 124. The wife's optional right, for the period she is given that right, is not necessarily to be exercised at its inception. It is lawful for her to postpone her optional right for some period of time. After the stay

with her husband, it is also lawful for her to postpone her claim for some further period.

Section 139. The decree of separation under the aforesaid section shall be equivalent to an irrevocable divorce.

Jordan :

Jordan's law on the subject of separation on the grounds of defects and diseases is not different from that of Lebanon. Hence Section 83 to 88 of Jordan's "*Qānūn al-Aḥwāl al-Shakhsiyyah*" are in accord with Lebanon's law.

Tunisia :

In "*Qānūn al-Aḥwāl al-Shakhsiyyah*" of Tunisia no law on this subject has been framed.

Morocco :

Section 54. (1) When the wife finds her husband suffering from diseases and defects like madness, leucocythaemia, consumption of a permanent nature, getting riddance from which is not possible or it is possible in more than a year's time but the staying of the wife with him (in that period) be not possible without her being harmed, she is entitled to demand divorce from him through the Court (*Qāḍī*) though the disease or defect in him be unknown to the wife from before or after the marriage contract and to which the wife is not agreeable. The court (*Qāḍī*) shall allow the husband one year's time. If he gets rid of the disease during that time well and good, otherwise the court shall make the husband pronounce divorce to the wife.

(3) If a woman is aware of the disease in a man and inspite, of it she contracts marriage with him, or the disease overtakes him after the marriage is contracted and the wife expressly or impliedly consents to it, she shall not be entitled to demand divorce on account of that disease.

(4) If the wife suffers from such disease as madness, leprosy consumption or *fitq*, hydrocele, rupture in the private part of a woman that deprives a man from pleasure in sexual enjoyment and the husband becomes aware of it before his having penetration, he has the option. He may, if he wishes, effect divorce to her. No dower shall be due on him. If he does not abstain from having sexual intercourse with her the entire dower shall then become due on him. The husband may not have known of her disease prior to his having penetration; after penetration when he comes to know of it he may, if he so wishes, retain the marriage bond or repudiate it. In such

event whatever amount shall be more than the amount of proper dower shall be returned by the wife to the husband, if already paid to her. If the wife, or the guardian of the wife, has practised fraud on the husband, the entire dower that the husband has settled on the wife shall have to be returned to him, (if already paid).

(5) Medical assistance of a distinguished physician shall be obtained for the diagnosis of the disease.

Section 55. Divorce got effected by a Qāḍī on the ground of the aforesaid diseases shall be irrevocable.

Iarq :

Section 44. (1) When the wife finds her husband to be impotent or finds him suffering from such a disease that impedes him in having sexual intercourse, she is entitled to file a petition in the department concerned for separation.

(2) When the wife after the marriage contract finds that her husband suffers from such a disease as leprosy, leucocythaemia, consumption, syphilis, madness on account of which her living with him without harm to herself is not possible or that any one of the diseases has overtaken him afterwards, she is entitled to have recourse to the department concerned.

(3) When the department concerned, after getting the medical examination made, expects the abatement of the disease mentioned in sub-sections 1 and 2 of this section, it shall postpone the separation till the disease abates and the wife shall be entitled not to associate with the husband during that period.

(4) If the department concerned does not expect any abatement in the disease, and the husband refuses to effect divorce and the wife insists on demanding separation, the Qāḍī in the circumstance shall pass a decree of separation.

Syria :

Section 105. The wife is entitled to demand separation in the following circumstances :—

(a) The husband suffers from such a disease that hinders him in having penetration; Provided that the wife does not suffer from such a disease.

(b) The husband gets mad after the marriage contract.

Section 106. (1) The wife's right of demanding judicial separation on the ground of diseases mentioned in the aforesaid section shall lapse if the

wife knew of those diseases prior to her contracting marriage or remains contented with them after her contracting the marriage.

(2) It is, however, established that the wife's right of demanding separation on the ground of her husband being impotent shall in no event lapse.

Section 107. If the disease mentioned in the aforesaid section is incurable the Qāḍī shall, in accordance with the demand, grant separation between the couple to be effected forthwith. If the disease is curable the Qāḍī shall postpone the demand for a suitable period which shall not be for more than a year. If the disease does not abate within that period, the Qāḍī shall get separation effected between them.

Section 108. Separation on the ground of disease is an irrevocable divorce.

Egypt :

Section 9. It is lawful for the wife to get herself separated from her husband when she finds in her husband disease like madness, leprosy, leucocythaemia which is permanent and not curable, or if curable it would take such a long time that the living of the wife with him is not possible without harm to herself. It is, however, essential that the disease in the husband be from before the marriage contract and the wife be not aware of it or the disease may have overtaken him after the marriage and the wife must not have remained contented with it. If the wife after her knowledge of the disease in the husband becomes contented with it expressly or impliedly then separation is not lawful.

Section 10. Separation on the ground of defect is an irrevocable divorce.

Section 16. The experts, on diseases or defects that form the basis of dissolving the marriage, shall also be consulted.

Indo-Pakistan Law :

The wife is entitled, by virtue of section 2(V) and (VI) of The Dissolution of Muslim Marriages Act, 1939 to demand dissolution of marriage on the ground of her husband being impotent since marriage or being mad for the period of two years. She is as well entitled to demand separation in case her husband suffers from leprosy or some venereal disease.

Dissolution can be claimed only when the husband is suffering from virulent venereal disease and not when he is suffering from venereal disease which is not at a stage where it can be communicated to the wife. Disease in quiescent stage with no chance of infection is not 'virulent'. (1947 All. L. W. 533).

Section 144. (1) The woman, who has been married in accordance with the law of *Shari'ah*, may obtain a decree of dissolution of her marriage through the court on the ground that her husband at the time of marriage contract was impotent and he continues to be so.

(2) On an application of a husband it is incumbent upon the court, prior to its passing decree for dissolution of marriage on the ground of the husband being impotent, to grant him time for a period of one year, on his request, so that he may within that time satisfy the court that he is no longer impotent. If the husband does so satisfy the court, it shall have no power to pass a decree of dissolution of the marriage contract on the ground of the husband's impotency.

COMMENTARY

In juristic terminology that man is impotent who inspite of having his organ is not capable of having sexual intercourse with his wife. This condition of the man be either since his birth or be on account of some disease, weakness, old age or other reasons. The man who is capable of having sexual intercourse with some woman and is not capable of having it with some other woman, shall be considered to be impotent in respect of those women with whom he is not capable of having sexual intercourse. The man who suffers from emission before contact with the woman, he, too shall be considered to be impotent.¹⁹

If the man is not capable of having sexual intercourse, his wife has been given under law the right of demanding separation through court. This right of the wife does not lapse even with the passage of time.²⁰

When the wife takes her case before a court it is incumbent upon the court to find out the truth from the husband. If the husband admits that he is not capable of having sexual intercourse with the wife the court shall grant him a year's time to get himself treated.

¹⁹Fatawa 'Alamgiriyyah, vol. ii, p. 155; Ibn al-Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, p. 618.

²⁰Ibn al-Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, p. 612 :

”وهو ای هنا الخيار على التراخي لا الفور فلو وجدته عنيماً اور مجباً ولم تخاصم زماناً لم يبطل حقها“

If the husband claims of his having sexual intercourse with the wife and the wife does not claim to be virgin the husband shall be made to take oath to support his claim. If he does take oath that he has had sexual intercourse with the wife, the court shall reject the petition of the wife. If he refuses to take such oath the court shall grant a year's time to him for getting himself treated.

If the wife claims that she is still a virgin the court shall order her to be medically examined. If the wife, on medical examination, is not found to be virgin the husband shall be made as above to take oath. If he takes oath that he has had sexual intercourse with the wife, the court shall not pass an order for separation. If the husband refuses to take oath the court shall grant him a year's time. If it is found on medical examination of the wife that she is still a virgin the court without making the husband take oath shall grant him one year's time for treatment.²¹

Same shall be the order in case the wife pleads about her being not a virgin and that her husband has despoiled her virginity by his fingers or by some other method and not by having sexual intercourse with her and the husband maintains that he has had sexual intercourse with her.²² According to Hanafis the result of the medical examination of the wife as to how her virginity came to be despoiled shall be relied upon. Preferably the number of doctors should be two.²³

The time of one year shall be counted from the day the court grants it. Prior to it whatever the time lapses it shall not be taken into account.²⁴

If the husband, on treatment, gets well within that one year and succeeds in having sexual intercourse with the wife even once, the right of the wife to the dissolution of marriage on this ground lapses.

If the husband does not succeed in having sexual intercourse with the wife even once within the given period of one year the court, on the desire of the wife, shall direct the husband to pronounce divorce to the wife. Upon his refusal, the court itself shall effect separation.²⁵

²¹*Ftaawā 'Alamgiriyyah*, Kanpur, vol. ii, pp. 155-56; Ibn 'Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, p. 612.

²²Ibn 'Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, p. 613.

²³Abdur Raḥmān Al-Jazarī: *Kitāb al-Fiqh 'alal Madhahib al-Arba'ah*, Cairo, vol. iv, p. 197.

²⁴Al-Sarakhsī: *Al-Mabsūṭ*, Cairo, 1324 A.H., vol. v, p. 102.

²⁵*Fatāwā 'Alamgiriyyah*, Kanpur, vol. ii, p. 156; Al-Marghīnānī: (d. 593 A.H.): *Al-Hidāyah*, Karachi, Chap. on "Impotents", vol. ii, p. 421; Ibn 'Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, Chap. on "Impotents" p. 611.

Indo-Pakistan Law :

The wife has been authorised by virtue of section 2 (V) of the Dissolution of Muslim Marriages Act, 1939 to demand separation on the ground of her husband being impotent and the court, on the application of the husband, is bound to grant him time for the period of one year.

Granting one year's time to an impotent husband is a settled rule of *Shari'ah*. The current law in Pakistan, by the addition of the words, "On the application of the husband", has been brought closer to the real spirit of the law. Same law is in force in India.

Time : The time that is allowed to the husband for the cure of his impotency is one year. It cannot be less or more than that period of time. It is stated in al-Hidayah that the year of probation fixed by the Qadi in the case of impotency is to be counted by the lunar calendar, whereas Fatawa Alamgiriyyah recommends the use of solar year by way of precaution.^{25b} This is usually followed now.

Restricted Impotency : A marriage was annulled on the ground of impotency although the evidence showed that it was restricted to the wife and was not a general condition of the husband. (*G. vs. M.* (1885) 10 App. Cas. 171).

A husband was held by the Madras High Court under the Indian Christian Marriages Act to be impotent when intimacy with the wife was not possible on account of the abnormal size of the male organ as a result of which ordinary and complete intercourse was physically impossible. It was held that the husband was impotent as far as the wife was concerned. The view was based on the reasoning that impotency includes impracticability of coition. (*Kanthy Balavendram vs. Harry*, A. I. R. 1954, Mad. 316).

Legal Presumption : Under Muslim law, the husband's impotency has to be proved as a fact. But under certain conditions a legal presumption is drawn by Courts that the husband is not potent. Thus if the husband and the wife have lived together for a long time in the same house under conditions when sexual intimacy was possible and it be established that the wife is still a virgin, though a fit subject for sexual intimacy, the Court may presume that the husband is incapable for coition at least with regard to the wife. (*Ibrahim vs. Altafan*, A. I. R. 1925, All 24 ; *Altafan vs. Ibrahim* A. I. R. 1924 All. 116, *G. vs. M.* (1885) 10 App. Cases 171).

^{25a}Al-Margīnānī: *Al-Hidāyah*, vol. ii, p. 421, (Chap. on "Impotents"), Karachi; *Fatāwā 'Ālamgīriyyah*, op. cit., vol. ii, p. 133.

^{25b}Ibid.

The Muslim jurists do not attribute impotency to the wife in any case. If the Court is satisfied that marriage has not been consummated although no impediment to consummation be apparent in the husband, the Court will be justified in dissolving the marriage. (*Ranga Swami vs. Aravind Ammal* A. I. R. 1937, Mad. 237).

Medical Examination : The decision of a case involving impotency becomes difficult when it is contested and a spouse denies the allegation made by the other. In such a case medical examination of the spouses becomes very important. An examination of the spouses is provided under the provisions of Muslim law. A Qadi has got full power to order the examination of the spouses or of one of them.^{25a} It has not been definitely stated by Muslim jurists as to what will be the consequences of refusal to allow such examination. It may, however, be presumed that the Qadi will be perfectly justified in drawing an inference against the party refusing the medical examination. The Courts in India and Pakistan have wide discretion in ordering medical examination of the parties subject to such conditions as may be necessary in a particular case. It was held in some cases under the Divorce Act (applicable to Christians) and also under the Hindu law that on the refusal of a party to attend for medical examination, the Court may draw an unfavourable inference against the party guilty of refusal. (*Brinda Kumar Viswas vs. Hemlata Biswas*, I. L. R. 48 Cal. 280 ; *Ranga Swami vs. Aravindammal*, A.I.R. 1937, Mad. 237). But a different view was taken in a later case when it was held that the mere refusal of the wife to have herself examined by a lady-doctor cannot be taken to be a proof of the consummation of her marriage. (*Ghulam Sakina vs. Falak Sher*, P. L. D. 1949, Lah. 75).

Experts' Opinion : A doctor's certificate to prove the capacity or incapacity of the other must be strictly proved by examining the doctor who has issued it so that it may satisfactorily be ascertained what test he has carried out and how has he arrived at his conclusion. (*Rangaswami vs. Aravindammal* A. I. R. 1937, Mad. 237 ; *Gonselves vs. Iswariah*, A. I. R. (1953), Mad. 858]. It may, however, be stated that opinions of doctors are relevant but not conclusive. When the experts differ the value and sufficiency of their value may legitimately form the subject of consideration and scrutiny even despite their acceptance by one Court or another. (*Altafan vs. Ibrahim*. 1924, All. 116).

Order of the Court : Ordinarily, the Court is to pass an order, if the husband so wishes, giving one year's time to him for treatment, and adjourn the case for one year. If on the expiry of one year the disease is found not curable the Court will pass a decree dissolving the marriage.

Allahabad High Court in the case of *Mohd. Ibrahim vs. Altafan*, (47 All. 283, AIR 1925 All. 24), observed that the decree that is passed in the first instance is more or less a decree *nisi*. It is a conditional decree which becomes operative only on the failure of the prescribed conditions. It does not change the status of parties who continues to be husband and wife till the decree becomes final. The husband continues to be liable for the maintenance of the wife while a spouse can, on the death of the other, inherit from the deceased.

The Bombay High Court had, at one time, passed in such a case an interlocutory order adjourning the further hearing of the suit for one year. (*A. vs. B.*, I. L. R. 21 Bom. 77). But in a later case it was not considered a correct procedure to pass a decree and direct its suspension for one year. (*Fatima vs. Jalal Din*, A. I. R. 1930 Lahore, 501). It was stated in the Allahabad case that a Court should adjourn the proceeding for one year and on the expiry of that period pass a decree dissolving the marriage. (*Mohd. Ibrahim vs. Altafan*, 47 All. 283; A. I. R. 1925, All. 24).

Waiver : Muslim jurists do not recognise a waiver by the husband, that is, time shall be given to him even when he does not want it or refuses to have it. The Lahore High Court has, however, held in a case that the condition as to adjournment is imposed for the benefit of the husband and if he does not want to avail himself of it he can certainly waive the right and in such a case the condition of suspension of the Court's order will not be necessary and the marriage shall be dissolved forthwith. (*Badrudin vs. Mst. Allah Bakhi*, A. I. R. 1937, Lah. 383). The principle of law laid down in this ruling is against the rule of Muslim law mentioned above, but, it appears to be more in accord with justice, equity and good conscience. It would be hard on the wife to make her wait for one year when the husband, for whose advantage the period of one year is granted, does not want it. If he considers that a grant of time is not necessary there is no reason why he should not waive this right. This difficulty is not experienced in India and Pakistan as time is granted to a husband under the provisions of the Dissolution of Muslim Marriages Act, 1939, only when he applies for it.

Section 145. The wife is entitled to demand separation through a court of law, if her husband has an amputated male organ or has no testicles or has a vestigial male organ being almost a non-entity. The court after finding the husband having no, or vestigial or a severed male organ shall, without allowing time, direct the husband to pronounce divorce. On his refusal to do so, the court itself shall be entitled to effect separation.

COMMENTARY

One year's time, in the event of the husband being impotent, is granted with a view that he may get himself treated and get the defect removed. The person whose male organ is severed or is vestigial there is no necessity for such grant of time. After the defect is proved, the court shall, on the request of the wife, pass decree for separation.²⁶

Section 146. The wife shall be entitled to obtain separation through court on the ground of her husband's madness.

Separation on
account of mad-
ness

COMMENTARY

According to Imām Abu Hanīfah and Imam Abū Yūsuf the wife is not entitled to demand separation from her husband on the ground of his being mad. According to Imām Muḥammad, however, she is entitled to demand separation by applying to a court and thus obtain separation from her mad husband; provided the madness of the husband be of such a degree that her living with him be impossible. According to the three A'immah, viz. Mālik, Shāfi'ī and Ahmad b. Ḥanbal as well the wife, in the event of her husband being mad, is entitled to demand separation.

In case of continuous madness of the husband the court ought to pass a decree for separation without giving any time to the husband. In case of intermittent periodic madness, indeed, time for a year may be given, as is mentioned in some books of *fiqh*. The difference between continuous and periodic madness can only be said that the madness which is temporary and wherein recovery occurs at intervals is a periodic madness. As against this the continuous madness is that which remains constant without any intermittent recovery.

Suggestion :

The wife has been empowered to demand separation under Section 2 (vi) of the Dissolution of Muslim Marriages Act, 1939, in cases where the husband suffers from madness for two years. That is to say, the right of demanding separation of the wife accrues to her when her husband has been mad for two years. In such cases there is no mention of time for treatment being granted to the husband nor any discrimination or distinction has been maintained in the suits regarding continuous and periodic madness. A study of the books of *fiqh* shows that in case of discontinuous madness the jurists

²⁶ *Fatāwā 'Alamgiriyyah*, Kanpur, vol. ii, Chap. on "Impotents", vol. ii, p. 157; Ibn 'Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., vol. ii, p. 609.

are in favour of granting one year's time to the husband for treatment. It shall thus be advisable that the minimum period of madness in the above law instead of two years be reduced to one year, and it should also be provided that a year's time be granted for treatment, in case of discontinuous madness.

In this connection it is necessary to differentiate here that the impotency of the husband becomes the basis of the right of demanding separation by the wife only when the defect be besetting the husband at the time of the marriage contract. If the husband becomes impotent afterwards, the wife has no right to demand separation. There is no such restriction in case of madness. Whenever the madness appears and it persists for more than the prescribed period the wife has the right of demanding separation.*

Condition of separation demand :

According to Ḥanafīs more or less the same conditions and limitations apply to the right of separation due to madness as are applicable in the case of the husband being impotent. If the wife is not aware of madness of her husband prior to the marriage contract and becoming aware of it after the marriage contract has not given her express consent to the maintaining of the marriage relationship intact, the wife has the right of demanding separation.

Payment of dower & observance of 'iddat :

If the dissolution of marriage is brought about before valid retirement the dower due on the husband shall lapse and, in the circumstance, the observance of the term of probation shall not be necessary in the same way as in case of separation before consummation of marriage the observance of the term of probation is not incumbent upon the wife. If the knowledge of madness is acquired after valid retirement and the dissolution of marriage is brought about thereafter, full dower shall become due on the husband and the observance of the term of probation shall also become incumbent upon the wife.²⁷

Court's View :

Delusion, hallucination or eccentricity : The fact that a husband or a wife suffers from delusion, hallucination or eccentricity etc. is not always a ground for divorce. A marriage is liable to be dissolved on the basis of insanity on two grounds, namely, the incapacity of a person to give his consent to the marriage when he is insane, and secondly, the fact that such a person cannot afford happy companionship to the other party. Both

²⁷ *Fatāwā 'Alamgiriyyah*, Kanpur, vol. ii, p. 133 ; *Dāmād Āfandī : Majma' al-Anhur*, Cairo, 1327 A.H., vol. i, p. 370.

these elements are not necessarily present in the case of delusion, eccentricity, hallucination, etc. and so there is no necessity to dissolve a marriage in every case merely on the presence of one of these grounds. But if the delusion takes such a shape as to influence the attitude of one spouse towards the other to such an extent as to make it dangerous and impossible for the other spouse to live in peace with him or her as when one spouse is under the delusion that the other is unfaithful to him or her, constantly watching his or her every act, shadowing his or her every movement thereby making the other nervous and even broken in health, marriage may be dissolved on this account under certain circumstances, (*Mst. Titli vs. Alfred Robert Jones*, A. I. R., 1934 All. 625). This decision may, in principle, apply to Muslim husband and wife.

Section 147. Subject to the provisions of Section 148, a wife is entitled to obtain a decree from court dissolving the marriage contract in the event of her husband suffering from disease like leprosy or leucocythaemia or some other similar disease provided the court, in view of the nature of disease, is satisfied that their living together is not possible and that there is a strong possibility of the failure of the purposes of marriage contract.

Separation on the ground of leprosy and leucocythaemia.

COMMENTARY

It is clear from the previous comments that there exists difference of opinion about the wife's right of demanding separation in case of contagious diseases like, leucocythaemia, leprosy, consumption etc. In the present writer's view, social justice demands that the wife must have the right of separation on the ground of these diseases. This right of the wife has been recognised particularly by Imam Muhammad among the Hanafis and by most of the *A'imma*h of other schools of *fiqh*.

Modern Legislation :

This right is also recognised in almost all the Muslim countries. In Pakistan, too, the wife's right of demanding separation on ground of the said diseases has been recognised under the current law of the Dissolution of Muslim Marriages Act, 1939.

Section 148. (a) If a woman has knowledge of a man's defect or disease except that of his impotency and inspite of that knowledge she marries him, her right of demanding separation on the ground of that defect or disease shall lapse.

Conditions of separation on ground of disease or defect

(b) If the disease or defect stated under the foregoing Section appears after the marriage is contracted and the wife has reconciled herself to it, her right of demanding separation shall lapse.

(c) After the knowledge of the disease or the defect, in the absence of the wife's expressly consenting to it, mere living together with her husband shall not be deemed as her consent to it, and her right of demanding separation shall not lapse.

COMMENTARY

There arise the following questions relating to the wife's right of demanding separation on the ground of disease or defect :—

1. Whether the disease in the husband existed prior to or after the marriage ?
2. Whether the wife was aware of the disease, if it did exist in the husband, prior to the marriage ?
3. Whether the wife's right of demanding separation shall lapse if she was aware of the disease ?
4. Whether she was reconciled if the disease did exist in the husband after the marriage ?
5. Whether the reconciliation of the wife should be express or implied ?
6. Whether the wife on being aware of her husband's disease should make the demand of separation at once or may wait for a while ? If she does, what should the period of limitation be ?

There are different views on the points as discussed below :—

Hanafi Law :

According to Hanafis the wife shall have the right of demanding separation on the ground of her husband being impotent, only when she had no knowledge of his being impotent prior to the marriage contract. If the wife becomes aware of his being impotent at the time of her marriage contract and in spite of it she gives her consent to the marriage contract

she shall have no right of demanding separation.²⁸ But in *Fatawa Tatar-khaniyah* it is written that she shall have that right.²⁹

Similarly for the dissolution of marriage contract it is a condition that the husband after the marriage contract must not have succeeded in having sexual intercourse with the wife even once. If he, after the marriage, succeeds to have sexual intercourse with her even once, she has no right to get the marriage dissolved, inspite of his becoming impotent afterwards.³⁰

Shaykh Ibn Humām in his noted book, "Fath al-Qadir"³¹ has written that if a woman contracts marriage with a man who is impotent or one who is without testicle that impedes him in having sexual intercourse with her and that she knows of the defect in him, she has no right to get that marriage dissolved; in as much as her right lapsed due to her consent. If she contracted the marriage without knowledge of the defect in him she must, on getting the knowledge of the defect, make a demand of separation through the court (*Qadi*). Merely the maintaining of silence by her shall not be deemed as her consent. But her right (of demanding separation) shall lapse on the man having sexual intercourse with her even once.³²

Maliki Law :

According to Māliki school of *fiqh*, the wife, in the event of the husband suffering from leprosy or leucocythaemia from before or after the marriage, has the right of demanding separation. She has the same right in case of madness. According to Ashhab, a Maliki jurist, however, the wife does not get the right of demanding separation in case of madness overtaking the husband after the marriage contract.³³

The wife's right of demanding separation, however, lapses inspite of the husband's impotency, if he is able some how to effect penetration.³⁴

Shafi'i Law :

Shafi'i jurists have made no distinction between the disease or defects existing before or after penetration. According to them, if the wife

²⁸ *Fatāwā 'Alamgiriyyah*, Kanpur, vol. ii, pp. 155-56; Ibn 'Ābidīn : *Radd al-Muhtār*, Cairo, 1256 A.H., vol. ii, p. 612; *Fatāwā Qāḍī Khān*, Delhi, vol. i, p. 188.

²⁹ Ibn 'Ābidīn: *Radd al-Muhtār*, Cairo, 1256 A.H., vol. ii, p. 597.

³⁰ Ibid, p. 609; *Fatāwā Qāḍī Khān*, Delhi, vol. i, pp. 188-89.

³¹ Published in Cairo, 1356 A.H., vol. iii, p. 264.

³² Ibn Nujaym: *Baḥr al-Rā'iq*, Cairo, 1311 A.H., vol. iii, p. 135.

³³ *Hashiyah al-Dasūtī*, vol. ii, pp. 325-27.

³⁴ *Muwāhib al-Jalīl*, vol. iii, p. 486.

becomes aware of diseases or defects, except that of the impotency of her husband, prior to her marriage contract, her right of demanding separation shall lapse.³⁵ Hence a woman who, before her marriage contract with a person becomes aware of his being impotent, or after the marriage, discovers that he is impotent yet she continues to live with him agreeably, (in these circumstances) her right of demanding separation shall not lapse. Indeed, except in the case of the husband being impotent, in all other cases of defects the demanding of separation at once is a condition of its being granted.³⁶ If the wife has the right of demanding separation, yet she does not make the demand, her right of demanding separation shall be considered as lapsed. The reason for exempting impotency from this category of defects is that it may exist at one time and may not exist at another. Again, in case of impotency, the man may respond differently from woman to women. It is possible that a man be impotent for a maiden but not for a married woman or that the case be *vice versa*.

Hanbali Law :

According to Hanbali jurists as well, the wife's right of demanding separation on account of the husband being impotent shall not lapse till she does not give her express consent to it, even though she may be aware of her husband's impotency at the time of her marriage contract. Ibn Qudamah Maqdisi has, therefore, said in his book, "*Al-Mughni*" that if the wife knowing the defect (except impotency) in the husband has consented to contract marriage with him, her right of demanding separation shall lapse. Contrary to this, the right of wife's demanding separation in case of husband's impotency shall not lapse until she says clearly that she accepts him inspite of his being impotent and that she is agreeable to his impotency. But in case silence is maintained by her it shall not be taken to mean her consent. An express consent shall prove her agreeableness and that only would make her optional right lapse.

Shi'i Law :

Accordingly to Sai'ah jurists whether the husband be mad from before or after the marriage contract or whether cohabitation with the wife has taken place or not, the wife on account of that madness, shall have the right of demanding separation. In the event of the husband being impotent if penetration has somehow taken place, the right of the wife shall lapse whether the husband be impotent from before or after the marriage contract.

³⁵ *Al-Mughni al-Muhtaj*, vol. iii, p. 204.

³⁶ *Al-Shi'rānī: Al-Mizān al-Kubrā'*, Cairo, vol. ii, p. 115.

As regards other defects, there are two assertions of Shi'ah jurists. One is to the effect that if the defects are there from before the marriage contract and the wife be not aware of the same she shall have the right of separation. The other assertion is that if penetration has taken place her right shall lapse, whether the disease or the defect be there or not at the time of marriage contract.³⁷ Shi'ah jurists also insist that the demand for separation should be made without delay immediately after the defect becomes known to the wife.³⁸

Conclusion :

After examining the above view-points of several schools of *fiqh*, the present writer comes to the conclusion that the woman's consent to marriage contract inspite of her knowledge of the defects and diseases in the man should be held to be good ground for the lapse of her right of demanding separation. But, however, the man's impotency should be held to be exempted from this rule. The opinions of other schools of *fiqh* compared to that of Hanafis in this connection appear to be equitable. This exception is based on the ground that a man who is found to be impotent in respect of one woman may not necessarily be impotent in respect of another woman too.

Similarly, the right of demanding separation by the wife should not be allowed to lapse without her express consent. Her mere staying and living with her husband should not be held to be equivalent to consent resulting in the lapse of her right of demanding separation. Thus, if the wife, after becoming aware of the disease or defect in the husband, does not demand separation at once, her right of demanding separation should not be held to be barred because women often under psychological and social inhibitions do keep silent for sometime in such matters.

Section 149. Separation on account of defect or disease shall tantamount to one irrevocable divorce.

Effect of separation on account of defect

COMMENTARY

According to Hanafis and Mālikis, separation on account of defect is equivalent to an "Irrevocable Divorce".³⁹ According to Shafi'is and Han-

³⁷ *Al-Rawḍatul Nudbah*, vol. ii, p. 125.

³⁸ *Jawāhar al-Kalām*, vol. v, p. 176.

³⁹ Al-Marghinānī: *Al-Hidayah*; Ibn 'Ābidīn: *Radd al-Muḥtār*, Cairo, 1256 A.H., p. 221; *Fatāwā 'Alamgiriyyah*, Kanpur, vol. ii, p. 133; *Fatāwā Qāḍī Khān*, Delhi, vol. i, p. 189.

balis, however, it is not divorce at all; rather it is a dissolution.⁴⁰ Shi'ahs too call it *faskh*, dissolution.⁴¹ In fact under the current laws of Arab countries such separation is held to be an irrevocable divorce.

The reason for holding it as irrevocable divorce is that when the wife, on account of defect and disease in the husband, demands separation from him, it becomes incumbent upon the husband to pronounce an irrevocable divorce to her. If he does not pronounce the divorce the court, as his representative, passes a decree or order for separation which should permanently repel the injury to her and that can only be done by an irrevocable divorce.

⁴⁰Ibn Qudamah al-Maqdisi: *Al-Mughni*, Cairo, 1367 A.H., vol. vii.

⁴¹*Jawāhar al-Kalām*, p. 176; Muhammad Kazim Tabātabā'i: *Al-'Urwatul Wuthqā*, Baghdad, 1330 A.H., p. 752.

CHAPTER XIX

Separation on Account of Cruelty

Section 150. (1) A wife is entitled to demand separation from her husband through the Court on the ground that her husband habitually assault her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or associates with women of evil repute or leads an infamous life, or attempts to force her to lead an immoral life, or he obstructs her in the observance of her religious profession or practice, or disposes of her property or prevents her exercising her legal right over it, or if he has more than one wives, does not treat her equitably in accordance with the injunctions of the *Qur'ān* and *Sunnah*.

(2) The Court on receipt of a complaint from the wife shall cause a notice served on the husband directing him to file his written statement in reply to the same, within a reasonable time fixed by the Court.

(3) The Court shall, after a written statement is filed by the husband and issues in controversy are framed, appoint two *Hakams* (arbitrators), if available, one from the family of the wife and the other from the family of the husband, as far as possible, and direct them to hold arbitration proceedings and answer the issues framed, within a time fixed by the Court. Upon receipt of the unanimous Report from the *Hakams* the Court will proceed to decide the case by making further inquiry, if deemed necessary, and pronounce its judgment in accordance with the said Report, if it is not otherwise found contrary to *Shari'ah*.

(4) If the Report is not unanimous the Court will itself try the case and give its own finding and decision.

COMMENTARY

God in the Holy Qur'ān says, "If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves ; and such settlement is best." (iv : 128).^{*} At another place, He says, "If ye fear a breach, between them twain, appoint (two) arbitrators, one from his family and the other from hers. If they wish for peace, Allah will cause their reconciliation." (iv : 35).^{**}

The question arises as to who are the addressees in these verses? :—

The first verse asks the couple to act in reconciliation. In the second verse God, addressing the officials of the State, says, "If you find disagreement between the couple it is incumbent upon you to appoint one arbitrator from the families of each of the couple, with a view to bring about reconciliation in them." It is written in *Tafsir Tabrī*, through the narrative of Sa'id b. Jubayr¹ that the verses are addressed to *Sultān* (Ruler). Imām Jaṣṣās has. as narrated by Suddi, written that the verses are addressed to husbands and wives.² But, to be more correct, it is the leaders of the community or the officials of the State that are addressed by the words, "*In khiftum*" i. e. if ye fear. This (second) Qur'ānic verse has in the background that social order of the 'Arabs wherein no regular media for dispensing justice was established by a sovereignless society ; rather the tribal heads themselves settled disputes arising between the individuals of their tribes. Hence the word, *Khiftum*" in this (second) verse firstly means "Tribal Heads" and secondly it means "Officials" of the State appointed for the purpose (*Qaḍis*).

Discord (Shiqāq) : On a study of the above Qur'ānic verse it appears that in this (second) verse the apprehension which requires the appointment of arbitrators is that of disagreement (*Shiqāq*) between the spouses. The literal meaning of the word, "*Shiqāq*" is discord. It has been derived from the word, "*Shiq*" which means direction. As the husband and the wife due to discord between them stand oriented in two directions, the Holy Qur'ān describes the situation by the word, "*Shiqāq*".

“وان خافت من بعلها نشوزاً او اعراضاً فلا جناح عليهما ان يصلحا بينها صلحا
الصالح خير”
***“فان ختم شقاق بينهما فابعثوا حكما من اهله و حكما من اهلها ان يريدوا
اصلاحاً يوفق الله بينهما”

¹Al-Tabri (d. 310 A.H.), *Tafsīr al-Tabrī*, Cairo, Matba' al-Amīriyah, 1323 A.H., vol. viii, p. 318.

²Al-Jaṣṣās (d. 370 A.H.): *Aḥkām al-Qur'ān*, Matba' al-Āstānah, 1328 A.H., vol. ii, p. 232.

Intention of Reconciliation :

From the words, “*in uridā iṣlāḥā*” in the above verse, the intention of both the arbitrators is meant; this is according to Ibn ‘Abbās and Mujāhid. That is to say, if both the arbitrators intend reconciliation, God would bring about harmony in the couple. Some people, however, assert that by the words “*in uridā iṣlāḥā*” the intention of the couple is meant. That is, if they (husband and wife) intend to remedy the situation and tell the arbitrators the truth, God shall bring about reconciliation between them.³

The meaning of “Hakam” :

The term *Hakam* that has been used in the above verse stands for several meanings. In general, it means “Official” or a “Judge” or an “Arbitrator⁴”. Its literal meaning is “to forbid” as stated by Ibn ‘Abbās.⁵ Several instances of using the word, *hakam* in the meaning of restraining are to be found in “*Tāj al-Urūs*”. The meaning of *hakam* has also been denoted as judge.⁶ Imām Rāghib in his famous work, *Al-Mufradāt Fi Gharīb al-Qur’ān* has said that the real meaning or *hakam* is to restrain something with a view to reform it.⁷

In *Al-Muḥallā*, Ibn Ḥazm says that when a quarrel arises between husband and wife the official shall appoint one arbitrator from the family of the husband and another arbitrator from the family of the wife.⁸

It is written in *Al-Mughni* that it is advisable to have the two arbitrators from the family of the couple. This dictate of God is due to the fact that these two arbitrators are expected to be more well disposed and more perceptive than the couple. If they be taken from other families it shall yet be valid because relationship is no consideration for arbitration or representation. God’s dictate with respect to the arbitrators *being chosen from the family* is by way of desirability.⁹

³Al-Qurtubi: *Tafsīr Jāmi‘ al-Aḥkām al-Qur’ān*, Cairo, vol. v, pp. 175-79.

⁴Ibn Kathīr: *Al-Nihayah*, vol. i, p. 280 :

“الحكم .. بمعنى الحاكم وهو القاضي”

⁵Ibn Manzūr: *Lisān al-‘Arab*, vol. xv, p. 33.

⁶Al-Zubaydī: *Tāj al-Uṣūs*, vol. viii, pp. 353-54.

⁷Rāghib Iṣfahānī (d. 502 A.H.): *Mufradāt al-Qur’ān*, (Urdu Tr.), Lahore, p. 237.

⁸Ibn Hazm (d. 456 A.H.): *Al-Muḥallā*, Cairo, vol. x, p. 87.

⁹Ibn al-Qudamah al-Maqdisi (d. 620 A.H.): *Al-Mughni*, Cairo, 1367 A.H., vol. vii, p. 171.

Jurisdiction of Hakam :

There is difference of opinion amongst the jurists whether the arbitrators are only empowered to bring about reconciliation or whether, in the event of reconciliation failing, they are also empowered to effect separation between the couple ?

One View :

One group of jurists is convinced of the fact that arbitrators shall be appointed only for the purpose of bringing about reconciliation. They shall have no power of effecting separation except when the husband and wife themselves give them that power. Of the Successors of the Companions of the Holy Prophet, Hasan al-Baṣrī, 'Aṭā, Qatādah and Abū Ḥanifah hold this view. A second opinion of Al-Shāfi'ī is also found in support of this view and Aḥmed Bin Ḥanbal too agrees with it in one of his assertions. The Zāhiriyyah and the Shi'ah Imāmiyah too follow the view of Imam Abu Hanifah that the arbitrators have no power to effect separation unless empowered by the couple.

Imām Al-Jaṣṣāṣ in his *Tafsir Ahkām al-Qur'ān* has said that the Companions of the Holy Prophet maintain that the arbitrators have no authority of effecting separation between the husband and wife except when the parties themselves agree to give such power to them. The Official does not authorise the arbitrators to effect a separation so they have no authority to delegate that power. The arbitrators are nothing more than representatives of the parties.¹⁰

It is said in the noted book of Al-Shāfi'ī, *Kitāb al-'Umm*, that God has said, "If you are apprehensive of dissension between the couple, send for one arbitrator from the husband's family and one from that of the wife." Indeed, God knows better what He wills. However, the manifest meaning of the verse is that if the apprehension of dissension between the couple be of a type that each of them complains of the denial of rights by the other, and each of them be not prepared to give what the other wants, and in spite of that the relationship between them, though with (a temporary) separation and suspension of cohabitation, does not snap, God, in the circumstance, has permitted the husband to counsel and admonish the wife, and to give up cohabitation with her for some time and even to give her a beating (not to the extent of injuring any part of her body). If the disobedience (cruelty and excess) be from the husband's side, God directs him to seek reconciliation and compromise. If the couple be apprehensive of not being able to maintain the limits set up by God there shall be no sin on them if the wife pays the agreed ransom (compensation) and obtains release from the nuptial

¹⁰ Al-Jaṣṣāṣ (d. 370 A.H.): op. cit., vol. ii, p. 233.

bond with the husband. If the husband, instead of that wife intends to have another wife, he has been forbidden to take back any of the properties that he has settled upon her.”

Imām Ṣhāfi‘ī has said, “If the husband and wife be apprehensive of dissension amongst them and take their case to the official, it is incumbent upon him to depute wise and patient arbitrators, one from husband’s family and the other from wife’s family, to enquire into the real cause of dissension and bring about a settlement between them. It will not be valid for them, even if they consider it proper, to pass order of separation between them except when the husband empowers them to do so. Nor can they give way on the wife’s property (i.e. nor can they get *Khul‘a* effected between them). If the husband and wife are reconciled it is incumbent upon the official (Court) to pass such order that should emphasise the spiritual, pecuniary and ethical rights of each against the other.

God has said that if they have the intention of improving their relations, God shall bring about agreement between them. God has not said that separation shall be effected between them. The official concerned, however, has been authorised to enquire of the husband and wife whether they agree to the decision of the arbitrators and whether they give them the right of effecting separation. If the husband gives them that right and both the arbitrators consider it advisable they may, in lieu of some consideration or without any consideration to be paid by the wife, effect separation between the couple. The couple, however, shall not be compelled to give that right to the arbitrators.”¹¹

In another book of Ṣhāfi‘ī fiqh “*Al-Mughni al-Muḥtāj*” it is written that apparently arbitrators (*hakams*) are representatives.¹²

In a book of Hanbali fiqh “*Al-Insaf*” it is said that the correct view of Hanbali school of fiqh is to the effect that arbitrators are the representatives of the couple. They are not deputed without their (husband and wife’s) consent and without being made their representatives.¹³

The Zāhiriyyah, too, hold the same view. Imam Ibn Ḥazam, accordingly, writes in his book, “*Al-Muḥallā*” : “the two arbitrators have no right of getting separation effected between the couple, neither by *khul‘a* nor by any other means”¹⁴.

¹¹Al-Ṣhāfi‘ī (d. 204 A.H.) : *Kitāb al-Umm*, Cairo, 1381 A.H., vol. v, pp. 194-95.

¹²*Al-Mughni al-Muḥtāj*, Cairo, vol. iii, p. 261.

¹³Al-Mardāwi: *Al-Inṣāf*, Cairo, vol. viii, p. 280.

¹⁴Ibn Hazm (d. 456 A.H.): *Al-Muḥallā*, Cairo, 1348 A.H., vol. x, p. 87.

The same is written in a book on Ja'fari *fiqh* "*Mukhtalif al-Shi'ah*" that the arbitrators have no right to get separation effected without the permission of the couple.¹⁵

The other View :

The second group of jurists is convinced of the authority of the arbitrators to get the separation effected between the couple in the event of their failure in bringing about reconciliation between them. The names of Sa'id b. Musayyib, Said b. Jubayr, Sha'bi, Imām Mālīk and Imām 'Awzā'i are stated to be included in this group. An assertion of Imām Shāfi'i is in consonance with the same and one of the two assertions of Imām Aḥmad b. Ḥanbal is also said to be in agreement with it. But the final opinions of Imam Shāfi'i and Imām Aḥmad b. Ḥanbal are that the arbitrators have no power of getting separation effected without receiving such authority.

In the commentary by Zarqāni on Imām Mālīk's "*Muwatta*" a narrative, with respect to the two arbitrators, has been reported from Imām Mālīk thus: "Yahya stated the tradition to me which he narrated from Imām Mālīk that he (Imām Mālīk) came to know that Ali Ibn Abi Talib has, regarding arbitrators on the point of *Khul'a*, said that "God directs: "If you apprehend discord between them delegate one arbitrator from the husband's family and one from that of the wife. If they both have the intention of betterment God shall bring reconciliation between them. God knoweth and is aware of all." The arbitrators are empowered either to get separation effected or bring reconciliation between them." Imām Mālīk has further said that he has heard from learned persons that the decision of the arbitrators, both in case separation is effected, or in case reconciliation is brought about between the husband and wife, is valid."¹⁶

It is stated in the noted book of Mālīkī *fiqh* "*Bidayat al-Mujthid*"¹⁷ that all the Imāms concur that in the event of discord between the couple the arbitrators ought to examine the situation and try to bring about reconciliation between them.....But there is a difference of opinion whether the unanimous decision of the arbitrators of getting them separated shall be given effect to or not ?

Ibn Rushd stating the rule of conduct of Imām Mālīk writes that arbitrators have the authority for both the things i.e. either bring about

¹⁵Al-Ṭūsī: *Mukhtalif al-Shi'ah*, Matba Hajar, Iran.

¹⁶Al-Zarqāni (d. 1122 A.H.): *Sharḥ al-Muwatṭā Mālīk*, Cairo, vol. iv, p. 133.

¹⁷Ibn Rushd ; *Bidāyat al-Mujtahid*, Cairo, 1379 A.H , vol. ii, pp. 98-99; *Al-Zarqānī*, op. cit., vol. ii, p. 133.

reconciliation or effect separation. Their decision either way shall be given effect to. Imam Mālik in support of his assertion quotes the narrative of Haḍrat 'Alī. Whereas Imām Abū Ḥanifah and Imām Shāfi'i argue that no body has been given the right of effecting divorce except when the husband himself delegates his right to some one else. The latter two Imāms, while arguing quote a report from Haḍrat 'Alī as well. Imām Mālik in fact considers the arbitrators as delegates of the proper official concerned and maintains that as the official of the time has the right, when he finds the living together of the couple detrimental (to the purpose of marriage), to get separation effected between them, so have the arbitrators the authority of getting separation effected.

Ṭabṛī, in his "*Tafsir*" has quoted the opinion of Ibn 'Abbās about the authority of arbitrators thus; "If both the arbitrators pass an agreed order that the couple be separated or that the couple be reconciled that order shall be valid."¹⁸

Ibn al-Hajar 'Asqalāni in his book, "*Fath al-Bārī*" (Sharh al-Bukhārī) has written : "As the officials, in this verse, have been addressed to, their sending the arbitrators to the couple proves the fact that the arbitrators have the authority of either reconciling the husband and wife or separating them."¹⁹

Hāfiz Ibn-al-Qayyim, in support of the viewpoint of the this group, has in his book, "*Zād al-Ma'ād*"²⁰ written : "It is highly surprising that some people regard the arbitrators as representatives although God holds them both to be arbiters and has called them (hakams) arbitrators. If both these arbitrators had been representatives, God would have said, Send one representative from the husband's side and one representative from the wife's side. Likewise had they been representatives there would not have been any particularisation in taking them from the family.....and to call representatives as arbitrators is neither correct according to the language of the Holy Qur'ān nor it is in accord with the diction of the Law-Giver. Arbitrators are neither commonly named as, nor particularly called, representatives."

Rationale of difference :

The first group of jurists holds that *hakams* are appointed only for the purpose of bringing about reconciliation. These jurists are convinced of the

¹⁸Al-Ṭabṛī (d. 310 A.H.): op. cit., vol. viii, p. 324.

¹⁹Ibn Hajar Asqalāni: (d. 852 A.H.); (*Fath al-Bārī*, Commentary on *Al-Bukhārī*), Cairo, 1378 A.H.

²⁰Ibn al-Qayyim (d. 751 A.H.): *Zād al-Ma'ād*, Cairo, vol. iv, p. 33.

hakmas having no authority of getting separation effected. They hold them to be representatives. If the parties authorise them to effect separation they can do so, otherwise not.

The second group in support of its claim advances the argument that the official (*Qādī*) deputs the arbitrators with the purpose of removing the differences. As the official, for the purpose of removing the differences, has himself the authority of either effecting reconciliation or, if necessary, effecting separation, the arbitrators too have the same authority.

Analysis :

To examine the question critically it is proper to seek aid from the writings of the learned commentators of the Holy Qur'ān. Accordingly, the relevant extracts from "*Aḥkām al-Qur'ān*" by Ibn al-'Arabi, "*Tafsīr Jāmi' al-Aḥkām al-Qur'ān*" by Qurtubi; "*Tafsīr*" by Ibn al-Kaṭṭīr, "*Tafsīr Kabīr*" by Imām Fakhr al-Dīn al-Rāzī, "*Tafsīr al-Kashshāf*" by Zamkḥsharī and "*Tafsīr Rūḥ al-Ma'ānī*" by Ālūsī are given below:

Ibn al-Arabi :

Ibn al-'Arabi in his noted work, "*Aḥkām al-Qur'ān*"²¹ says, "Hasan al-Baṣrī and Ibn Zaid say that the two arbitrators are witnesses and they take the matter to the *Sultān* and bear witness to the fact that comes to their knowledge; but Ibn 'Abbas call them arbitrators not witnesses (or representatives)".

Ibn al-'Arabi further writes that God's words are, "Depute one arbitrator from the family of the husband and one arbitrator from the family of the wife". Thus it is a direction from God that these two are the Judges (*Qāḍīs*), not representatives. In *Shari'ah*, there is a specific word used for representative and specifically another for arbitrator (*Ḥakam*). When God has specified for each of them a term of its own, it does not behove a common man, what to speak of a learned person, to intermingle the meaning of one with the meaning of another. It would amount to creating confusion in the dictates of *Shari'ah*.

Al-Qurtubi :

Al-Qurtubi²² writes in his *Tafsīr Jāmi' al-Aḥkām al-Qur'ān* thus : "The learned scholars (*ulamā*) have said if both the arbitrators find dissension between the husband and wife to the extent that they do not

²¹ Ibn al-'Arabi (d. 542 (A.H.): *Aḥkām al-Qur'ān*, Cairo, 1331 A.H., vol. i, p. 177.

²² Al-Qurtubī: op. cit., vol. v, pp. 175-79.

agree with each other and continue to persist in their disagreement, they shall, as far as possible, try to bring about harmony and love between them. They shall put fear of God into them and counsel them on their mutual social behaviour. If they both heed the counsel they shall be left alone. If they act otherwise and the arbitrators consider the effecting of separation advisable they shall get separation effected between them. Separation effected by the arbitrators shall be valid for the couple and it shall make no difference whether the opinion of the *Qāḍī* be in accordance or at variance with the same and whether or not the couple did empower the arbitrators as their representatives to effect separation. This separation shall be an irrevocable divorce. One group of ('*Ulamā'*) assert that it is not valid for the arbitrators to get separation effected unless the husband and wife appoint them their representatives for this purpose. This assertion is based on the fact that the two arbitrators are envoys and witnesses. Indeed, if the *Qāḍī* so intends, he may effect separation between the couple or direct the arbitrators to get a separation effected. This is one of the two opinions of Al-Shāfi'ī. Same is the assertion of the people of Kūfa, and that of 'Ata, Ibn Zaid, Hasan al-Baṣrī. And this very opinion has been adopted by Abu Thawr."

'Allāma Qurtubi, after this adds: "The first assertion is correct. That is to say the arbitrators have the authority of effecting separation without being appointed as representatives. This is concurrent opinion of Mālik, Awzā'i and Ishāq. Same is stated to be the assertion of 'Uthman, 'Ali and Ibn Abbas. Same is the position taken by Sha'bī and Nakh'i too. And same is the view of Al-Shafi'ī. God has ordained "Send one arbitrator from the family of husband and one arbitrator from the family of wife". And this is an indication from God that these two are neither representatives nor witnesses, they are judges. The term representatives carries a separate implication in *Sharī'ah* and similarly does the term arbitrator carry a separate implication. When God has used the terms separately it does not behove a common man, what to speak of a learned person, to assign the meaning of one word to the other word."

'Allāma Qurtubi, refering to Ibn al-'Arabī, further says, "when God has bestowed authority upon the arbitrators, such authority is over and above the authority given by the spouses. Hence it is incumbent that the authority (of arbitrators) should be independent of the opinion of the spouses and its character should be decisive. If however, the arbitrators, on the authority given to them by the spouses, put their decree into effect it cannot be said that the decree so executed is against the authority given by the spouses. It naturally does not have a separate identity. The assertion, therefore, that the right of effecting separation depends upon the consent

of the spouses who appointed them as agent or representative, is altogether wrong. Men other than the spouses themselves have been addressed (in the verse) by God to be sent as arbitrators when discord among the spouses is apprehended. When those who are addressed to are other than the appointees of the spouses, how the separation effected by them can be held to be as of their representatives."

Al-Razi :

Imām Fakhr al-Dīn al-Rāzī in his noted work, *al-Tafsīr al-Kabīr*²³ poses a question : "Is it valid for the arbitrators to put into effect the decision given by them without obtaining consent from the spouses? For instance, May the arbitrator on behalf of the husband effect divorce to the wife or the arbitrator on behalf of the wife may offer compensation (i.e. obtains *Khul'a* for the wife by making over some property in return)? The following two assertions of Imām Shāfi'ī are quoted in answer.

1. It is certainly valid for the arbitrators to effect separation. Similar is the opinion of Imām Mālik and Ishāq.
2. It is not valid for the arbitrators to do so. This is the assertion of Imām Abu Hanifah on the ground that appointment here, like other agencies, is an agency or delegation of power only.

Al-Rāzī, mentioning the tradition stated by 'Ali, proceeds that Imām Shāfi'ī has said, "For each of the two assertions there is a proof in this tradition." The proof of the first assertion is that 'Ali without the consent of the couple appointed the arbitrators and told them that they had the right of uniting the couple if they considered it advisable and of separating them if they thought it to be proper. The argument that is advanced from the word, "*Alaykuma*" "on you both", in the assertion of 'Ali is, that it was valid to unite them if they considered it advisable and to separate them if they thought it proper. However, the second argument based on this assertion is that when the husband did not consent on separation 'Ali was in two minds : His opinion that the husband has a false position meant that he was not being just to his wife as she was to him in presenting the case. He meant that the husband should agree to the authority of separation of the *hakam*, as his wife had consented to.

Those who have argued in support of the first view have said that God made both of them arbitrators, and arbitrators are the judges. When they are judges the authority of issuing orders is conferred on them (i.e. they

²³Al-Rāzī, Fakhr al-Dīn: *al-Tafsīr al-Kabīr*, Cairo, 1938 A.H., vol. x, p. 93.

possess the authority of passing orders). And those who have argued for the other view say when God speaks of the arbitrators, He delegates no power to them except that of betterment or improvement of the conduct of spouses. It consequently follows from this that except the right of such betterment no other right has been delegated to the arbitrators" (i.e. the arbitrators can put into effect no other matter, without the authority of the same being delegated to them, except the matter of improving relations and bettering conduct of the spouses towards each other).

Al-Rāzī further on writes, "Ibn al-Jarīr has argued from the report of Ibn-'Abbās that he, in respect of this verse, has said, "If the arbitrators agree either on separating or uniting the couple their order shall be valid." But Abdul Razzaq and others have deduced from the said report of Ibn 'Abbās and have said, "The arbitrators are appointed to bring about better relationship between the couple. Effecting of separation is not in the hands (authority) of the arbitrators".

Tafsir Ibn Kathir :

Ibn al-Kathīr in his "Commentary on Al-Qur'ān"²⁴ says of this verse : "In this verse it is stated what is to be done when the couple be at logger's heads. The 'Ulamā' say that in such a situation the official ought to appoint a person of integrity and understanding to find out as to who of the two perpetrates cruelty and commits excesses. He must stop the one found cruel from continuing with the cruelty. In spite of this, if the situation does not take a better turn, he ought to appoint better persons, one on behalf of the husband and one on behalf of the wife, as *Munsifs* (Judges). These two should jointly investigate and decide what they think advisable. That is, either they should separate them or reconcile them. But the Law-Giver lays down that an attempt should, as far as possible, be first made to find out some way of continuing and enduring conjugal relationship. If the inquiry shows the husband to be guilty they would keep away the wife from him and would compel him to stay away from the wife while he pays for her maintenance, till he mends his ways. If the wife be proved guilty, they would not make the husband pay for her maintenance and would persuade or compel her to live with her husband amicably. Likewise, if they decide for divorce the husband shall have to pronounce divorce. If they decide that the couple should live together they shall have to abide by that decision. Ibn 'Abbās says, in the event of the concurrence of both the arbitrators, the couple should continue to endure their relationship agreeably; if one agrees and the other does not agree with the decision, and in that state one of the couple dies, the one who agrees shall inherit from the

²⁴Ibn Kathīr: *Tafsīr*, (Urdu Tr.), Karachi, vol. iv, pp. 22-24.

other who does not agree, but the one who does not agree shall not get any inheritance from the other who does agree with the decision. Caliph *Uthmān*, in a case of the like nature appointed Ibn ‘Abbās and Mu‘āwiyah as arbitrators and told them if they considered reconciliation between the couple advisable so shall it be; if they considered separation of the two proper so shall it be done. It is noted in a report that ‘Aqīl Ibn Abi-Ṭālib married *Fatimah Bint ‘Atbah Bin Rabi’ah*. She said, “you shall come to me and I shall bear your expenses”. It so began to happen that whenever ‘Aqīl came to her she would ask, “Where are ‘Atbah Bin Rabi’ah and Shaybah Ibn Rabi’ah.” He would answer, “On your left, in Hell.” On this she getting angry would gather up her clothes. Once she came to Caliph *Uthmān* and narrated the facts to him. The Caliph laughed at it and appointed Ibn ‘Abbās and Mu‘awiyah as their arbitrators. Ibn ‘Abbās maintained that separation should be effected between them, whereas Mu‘awiyah said, “I dislike this separation (of the couple in such a noble family as that of) Banū ‘Abd Manāf.” Both of them went to the house of ‘Aqīl. They found the door closed and the husband and wife both inside (i.e. reconciled). They returned back.

It is stated in *Musnad ‘Abd al-Razzāq* that during Caliphate of ‘Ali, a husband and wife brought their dispute before ‘Ali. They both had their relations with them. ‘Ali selected one from each (group) and appointed them as arbitrators and told them, “Do you know what is your function? You hold the office of either bringing about a reconciliation or effecting separation between the two”. The wife hearing this said, “I shall agree with the decision of God be it reconciliation or separation”. The husband said “I don’t want separation”. On this ‘Ali said, “No! by God you shall have to agree in either case.” Thus the ‘*Ulamā*’ are unanimous on the point that in such events the two arbitrators must be given both the powers. *Ibrahīm Nakh‘ī* goes so far as to say, “If required they may even get two or three divorces effected.” The same is narrated from Imam Mālik.

Hasan Al-Baṣṭī, however, maintains that the arbitrators have the right of bringing about union, not separation. Same is the assertion of Qatadah and of Zayd Bin Aslam. Same is the assertion of Imām Ahmad, of Abu Thawr and of Da‘ūd. They argue that there is no mention of separation in the verse “*in urīdā iṣlāhā*”, if they (both) intend betterment (of relationship). But if they be the representatives (agents) of both the sides, their decision either for effecting union or separation both shall be put into effect. Nothing has been narrated against it.

²⁵‘Aqīl was the brother of *Ḥaḍrat ‘Alī*. He married *Fāṭimā bt. ‘Atbah*. Both ‘Atbah and Shaybah sons of Rabi’ah, during their infidelity, were killed at the hands of ‘Alī and other Muslims in the “Battle of Badr”.

Let it be noted that these two may either be appointed as arbitrators by the official and shall give a decision even though the couple may dislike it. Or they shall be appointed as representatives by both the husband and the wife. So also their decision, though it be disagreeable to the parties, shall be final. The first is the rule of conduct of the great majority of 'Ulamā' who argue that the Holy Qur'an names them as arbitrators. The decision of arbitrators, agreeable or not agreeable to any one, shall be final in all events. The apparent words of the verse too support the view of the majority. The final assertion of Imam Shāfi'ī is also to this effect. Same are the assertions of Imām Abū Ḥanīfah and his companions.

Those who uphold the second view maintain that had those persons been arbitrators how would 'Ali say to the husband that 'the wife agreed to either event. Till you (husband) too (like her) did not agree to either event you have brought a false case.' (Allāh knows best). 'Allama Ibn Abdul Bar says, "The 'Ulamā' concur that when the two arbitrators differ none of them shall be relied upon. There is, however, consensus of opinion on this that when they get reconciliation effected their decision will be given effect to. In case they decide for separation whether or not their decision shall be given effect to is a controversial question. But the rule of conduct of the multitude is that their decision shall be given effect to in that case as well, inspite of the fact that they may not have been appointed as representatives by the husband and the wife.

Al-Zamakhshari :

Al-Zamakhshari in his Commentary *Al-Kashshāf 'an Ghawāmiḍ al-Tanzīl* has written, "If you say, that the arbitrators have the right, if they consider advisable, of either reconciling or separating the two (i.e. the husband and the wife), I would say there is difference of opinion on this question. Rather, it has been said that the arbitrators without the consent of the couple have no right to do so (i.e. separate them). It has also been said that the matter is committed or delegated by the ruler to the two arbitrators who may pass order as they consider proper."²⁶

Al-Alusi :

The author of "Rūḥ Al-Ma'āni" Syed Mahmūd al-Ālusi mentioning the difference of opinion on the power of effecting separation by the arbitrators has said: "There is difference of opinion on the question whether the arbitrators, if they think proper, can effect reconciliation or separation between the husband and wife. There is a report stated to be

²⁶Al-Zamakhshari (d. 538 A.H.): *Al-Kashshāf 'an Ghawāmiḍ al-Tanzīl*, Cairo, 1948 A.D., vol. i, p. 396.

from 'Ali that a husband and his wife came to him. Each of them were accompanied by a group of persons belonging to their respective folk. 'Ali asked them to select an arbitrator from the husband's folk and another arbitrator from the wife's folk. (Selection having been made), he asked the two arbitrators, 'Are you aware of your responsibilities'? He proceeded to answer the question himself, 'It is incumbent upon both of you, if you think their union proper, to unite them and if you think their separation proper, to effect separation between them. The wife said, 'I agree with whatever there is in the Book of God; whether it be against me or it be in my favour'. The husband said, 'I, however, do not like separation' (i.e. I do not agree to the separation). 'Ali told him, 'You lied; By God you shall not move from here till you do not say as your wife has said.'"²⁷

Summary of Arguments :

While studying the different narratives and points of view on the question of the authority of arbitrators to effect separation, in the above-noted Commentaries of the Holy Qur'ān, and books of fiqh, the following points can be made out.

Arguments against power to separate :

1. The duty of the arbitrators is to bring about reconciliation and not to effect separation. God, in the Qur'an says, "If they both intend for reconciliation, God shall create unity among them," God has not said, anything like "If both intend separation." The real duty of the arbitrators is to counsel the husband and wife, to prevent their going astray and to instruct them to adopt the righteous path. (Let it be said that the arbitrators (*Hakams*) have the power of stopping i.e. the power of preventing, as the literal meaning of the word *Hakam* is also to restrain and to prevent).

2. The narrative regarding 'Ali proves that the decision of the arbitrators cannot be given effect to until the arbitrators are empowered by the husband and wife to give the decision (on separation). That is why 'Ali asked the husband to agree to the appointment of the arbitrators and delegate to them the same power respecting separation as was delegated to them by the wife. Had there been no necessity of the husband agreeing to it 'Ali, would not have asked the husband to act as the wife had acted, concerning the arbitration and the right of effecting separation. Had the Qur'ān delegated to them the right of effecting separation also, there was no necessity of taking consent to it of the husband. Hence, the narrative proves that the arbitrators have no authority of effecting separation except

²⁷Al-Ālūsī, Sayyid Maḥmūd (d. 1270 A.H.): *Rūḥ al-Ma'ānī*, Cairo, vol. v, pp. 26-27.

when the husband and wife delegate that authority to them. In that event, it would be said that the arbitrators exercised the authority that was delegated to them by the husband and the wife. That is to say, they would act as representatives, and their act would be taken as the act of the husband and the wife themselves. Hence, the same would become enforceable.

3. For the sake of argument, if it is admitted that the arbitrators have the power of effecting separation the same shall be effected either by the way of divorce (if the husband is at fault) or by way of *Khul'a* (if the husband is not at fault and the wife desires release). If the separation is effected by way of divorce the husband shall be liable to pay up then and there the deferred dowry. The arbitrators have no authority to impose pecuniary liability on any one of the parties. Likewise, if the separation is effected by way of *Khul'a*, the liability of paying compensation, without the consent of the wife, cannot be fixed on her. God, in the Holy Qur'ān lays down, "O'ye, who believe ! Eat not up your property among yourselves in vanities. But let there be traffic and trade by mutual good-will." (IV : 29). Arbitrators getting the property of the wife made over without her consent shall come within the mischief of "eating up in vanity". Such action of the Arbitrators, without religious sanction, will not be legal.

4. There ought to be some basis for the arbitrators to have the right of effecting separation. This right to them is not clearly mentioned in the Holy Qur'ān; rather the words, 'If they both intend reformation, negate their (arbitrators') right of effecting separation. Hence this right ought to be delegated to them either by the Ruler (*Qāḍī*) or by the husband and wife. It is thus clear that the right which is exercised by the arbitrators is delegated to them either by an Authority or by the couple, not that the right is vested in them inherently as arbitrators.

Arguments for power of separation :

(1) God in this verse has used the words, *Hakam*. This denotes that they both are arbitrators. Had they been representatives, God may have said "*Vakil*" instead of "*Hakam*". Consequently consent of husband and wife is not necessary for separation. The arbitrators shall decide according to what they consider advisable. If the arbitrators among themselves agree on bringing about reconciliation between the couple they shall get the same effected. If, however, they consider separation inevitable they shall get that effected too.

(2) God, in the relevant verse of the Qur'ān has used the word, "*Iṣlāḥ*" i. e. correction, reformation. He has not said or mentioned the word "*Furqat*" i. e. separation. It is thus preferable that the arbitrators try

their level best to bring about reconciliation. This, however, does not mean that their effort should be limited to bringing about reconciliation only. If the circumstances demand that separation should be effected between them, the same has got to be effected. This, too, is a means of bringing about reformation. If reconciliation be not possible the couple cannot be left in a state of feud. In such event, effecting separation shall become a necessity and the same shall not require the obtaining of consent from the husband.

(3) When a judge (Qaḍī) deposes arbitrators to bring about reconciliation between the couple he, in fact, delegates to them his authority. Therefore, when the arbitrators decide for separation they do so in the capacity of deputies and delegates of the judge. 'If ye fear' (فَانْ خِفْتُمْ) in the verse is obviously addressed to officials; their deposing the arbitrators (for) the couple proves the fact that arbitrators have the authority of effecting separation as well.

(4) The word 'alaykuma' (incumbent on you both) in the tradition of Hadrat 'Alī is a proof of the fact that the arbitrators do have the authority of effecting separation.

Pakistan Law :

Pakistani Courts agree with the view-points of the first group. Justice A. R. Cornelius (later on Chief Justice of Pakistan) in a full Bench case '*Sayeeda Khanam vs. Muhammad Sami*' (PLD 1952 Lah. 113) has accordingly held that the arbitrators of themselves have no authority of effecting separation between the couple, except when the authority for the same is delegated to them by the couple. The learned Judge has, in his judgement, further said that the separation so effected shall not be called, 'separation effected through Court, because a court is entitled to pass orders of separation only when it is satisfactorily proved before it that the husband has committed acts that occasion, under Islamic Law, the granting of such relief (separation). The learned judge discussing the literal meaning of the word, *Hakam* as 'Judge' or 'Arbitrator' wrote "It seems to me, and here I speak with the greatest possible respect, that it is largely the result of employment of these two senses viz. Judge and arbiter in the commentaries upon and the translations of this particular verse, which have introduced in a great number of minds the feeling that judicial functions were conferred by this verse upon the two persons whom the representative of the State was required to appoint for the purpose of enquiring into the relationship between the spouses."

The learned judge further said, "Giving, then, the radical meaning to the word *hakam* and bearing in mind the possibility, may be the probability, that there could never be an intention of confusing jurisdictions, or providing more than one authority, at the same time, to be seized of a particular matter (in this case the question whether the spouses were to be separated), I am of the opinion that the meaning of the word, *Hakam*, which should be accepted for the purposes of placing a correct interpretation upon verse 35, is that which is in contra-distinction with the judicial function. Having regard again to the organisation of society among the people to whom this Scripture was revealed, viz., on a tribal and family basis, it becomes reasonably possible that by '*hakam*' is meant persons from the tribes of the respective spouses who exercise authority over the members of their tribes in such a way that they are capable of restraining such persons from acting in any particular way, or from acting wrongly and such persons could only be those who were acknowledged heads of the tribe, i.e. the legitimate chiefs or otherwise the elders of the tribes..... If this differential sense be applied to the word '*Hakam*' as employed in verse 35, it becomes possible to perceive the nature of the direction with clarity and without any possibility of causing confusion of jurisdictions." The learned judge thus arrived at the conclusion that the arbitrators by themselves have no power to get the separation effected between the married couple.

In a latter full Bench case "*Bilqees Fatima vs. Najmul Ikram*" (P L D 1959 Lah. 566) Justice Kaikaus respecting "*Hakam*" held, "I would take the word '*hakam*' to mean, in general, Judge or Arbitrator. Hence, a person who is merely a conciliator is neither a Judge nor an arbitrator". The learned Judge though he did not express clearly his view-point on the right of effecting separation, but as the observation connotes appeared to be in favour of the right of separation.

Modern Legislation :

The View in other Islamic countries in this respect is detailed below :

Iraq—Qānūn al-Aḥwāl al Shakhṣiyah, 1959:

Section 40 (1) When one of the couple has complaint of receiving injury from the other on account of which leading life together is impossible, or one of the two has complaint of mutual altercation, that one shall have the right of claiming separation through *Qāḍī* (court).

(2) Before the *Qāḍī* passes some order it is necessary for him to appoint, if available, an arbitrator on behalf of the wife and another on behalf of the husband with a view to bring about reconciliation between them. If the arbitrators are not available, the *Qāḍī* shall instead of these

two *hakams*, authorise the spouses to choose the two arbitrators. If the spouses fail to choose them, the *Qāḍī* himself shall appoint the two arbitrators.

(3) It should be incumbent upon the arbitrators that they make efforts for bringing about reconciliation. On failure, they shall place the matter before the *Qāḍī* and make it clear as to who is at fault. If the arbitrators differ among themselves the *Qāḍī* shall appoint a third arbitrator.

(4) When it is proved to the *Qāḍī* that of the couple one is causing injury to the other or that there is permanent wrangle between them or that the *Qāḍī* himself is unable to bring about reconciliation between them and that the husband does not consent to pronounce divorce, the *Qāḍī* shall then get separation effected between them. If the wife is found to be at fault the deferred dower due on the husband shall lapse. If the wife has already realised the entire dower the *Qāḍī* shall order her to return to her husband that part of the realised dower which is in excess of half of the dower.

(In Iraqi law, the *Hakams* do not, thus, have the inherent authority for separation).

Egypt—Qanūn al-Ahwāl al-Shakhsyah (No. 25 of 1929) :

Section 6. When the wife complains of such cruelty of her husband that it is impossible for her to have permanent matrimonial relationship with him, she shall have the right of applying to the *Qāḍī* for getting her separated from the husband. On an application made if the *Qāḍī* finds the cruelty proved and no possibility of the rectification of the same, he shall get effected an irrevocable divorce to the wife. If the said application is rejected and the wife files the complaint again and the husband's cruelty is not proved, the *Qadi* shall, under sections 7, 8, 9, 10, 11, appoint two arbitrators.

Section 7. It is essential that the arbitrator be males, be just and be, as far as possible, from the couples family. If they be not from the couple's family they must be such who are well aware of the couple's circumstances and have the power of bringing about re-conciliation between them.

Section 8. It is essential for the arbitrators to find out the cause of difference between the couple and try to ameliorate the situation. If the amelioration, in ordinary course, be possible they should come to a decision in accordance with the requirements of the case.

Section 9. When the two arbitrators fail in their attempt to bring about amelioration because of the excesses of the husband or because of the excesses from both sides or because of their not being able to know the correct situation, they shall have the power of getting a separation effected between them (the couple) through an irrevocable divorce.

Section 10. It is incumbent upon the arbitrators that whatever decision they give they must place the same before the *Qāḍī* and it is incumbent upon the *Qāḍī* to deliver judgement in conformity with the requirements of that decision.

(Under Egyptian law the *Hakams* may decide about separation but their decision is given effect to by a decree of the Court).

Tunisia—Mujallatul Ahwāl al-Shakhsyah :

Section 25. When one of the spouses complains of the cruelty perpetrated by the other but has no witness for the same and the official by himself finds it difficult to establish cruelty with either of them, he shall appoint two *hakams* (arbitrators). It shall be incumbent upon the two arbitrators so appointed to make investigation in the case. If they find that they can bring about conciliation between the couple they would do so, but in any case they shall have to place the matter before the *Qāḍī*.

(Under Tunisian law, for reconciliation as well as separation, the *Hakams* have no authority to enforce their decision).

Morocco—Mudawwanatul Ahwāl al-Shakhsyah :

Section 56. (1) When the wife ascribes to her husband such cruelty which makes intrinsically the leading of life permanently with that husband by a woman of her type impossible, and whatever she ascribes gets proved and the *Qāḍī* remains unable to bring about reconciliation between them, he shall pass an order effecting divorce.

(2) When the wife's complaint is rejected and she for the second time files the complaint before the *Qāḍī* and fails to prove the same, the *Qāḍī* shall appoint two arbitrators with the purpose of bringing about reconciliation between them.

(3) It shall be incumbent upon the arbitrators to find out the cause of difference between the spouses and try to bring about reconciliation between them. If the two arbitrators are unable to bring about a reconciliation they shall place the matter before the *Qāḍī* who, in the light of their report, shall decide the matter.

(Thus under the law of Morrocco, the *Hakams* do not have authority to separate the couple).

Jordan—Qunūn al-Hūqūq al-Ā'ilah ;

Section 96. When the wife has complaints of such cruelty of her husband which make the passing married life with him by a woman of her type impossible, she shall have the right of applying to the *Qāḍī* demanding separation. The *Qāḍī*, after such complaints are proved before him and he fails in his attempt to bring about reconciliation between them, shall appoint two arbitrators, having in view as regards them the following matters :—

- (a) It is incumbent that the arbitrators be males, just, capable of bringing about conciliation and be, as far as possible, from the family of the spouses, if it is not possible they may be taken from other families.
- (b) It is incumbent upon the arbitrators to find out the cause of difference between the couple and to make an attempt at bringing about conciliation between them and settle the matter, if possible, in the best manner.
- (c) If the arbitrators fail in bringing about conciliation and in that the husband be at fault they shall pass order for separation effected through irrevocable divorce without compensation. If the wife be at fault or the correct situation does not become known, separation shall be got effected between them with payment of a portion of dower that be in conformity with the fault of each of the couple. If the fault be of the wife alone separation shall be got effected on appropriate compensation paid by her. It shall also be incumbent upon the arbitrators to have the compensatory allowance deposited with themselves prior to such divorce (separation).
- (d) If the arbitrators differ between themselves the *Qāḍī* shall appoint other arbitrators in place of them or shall, besides the two, appoint from a third family another person as an umpire.
- (e) It is incumbent upon the arbitrators, whatever the conclusion they arrive at, that they must submit it to the *Qāḍī*. The *Qāḍī*, in the light of that conclusion, provided the same be based on the principles of *Shari'ah*, shall pass appropriate orders.

Section 97. The order passed for separation shall tantamount to an irrevocable divorce.

(Under the law of Jordan, the Hakams may decide about separation, but their decision is to be given effect to by the order of the *Qāḍī*).

Syria—*Qanun al-Ahwal al-Shakhsyah*, 1953 :

Section 112. (1) When any one of the couple has complaints of cruelty against the other on account of which their passing of married life together permanently becomes impossible, they shall have the right of demanding separation through the *Qāḍī*.

(2) When such cruelty is proved and the *Qāḍī* is unable to bring about conciliation he shall get separation effected between them and the same shall have the force of an irrevocable divorce.

(3) When cruelty is not proved or on the complaint of cruelty by the husband the *Qāḍī* grants time for conciliation, which shall not be less than a month, and inspite of that the husband insists on his complaint and conciliation is not brought about, the *Qāḍī* shall appoint two arbitrators from the family of the couple possessing ability of bringing about conciliation. The *Qāḍī* shall put the arbitrators on oath that they shall carry out the purpose set before them justly and honestly.

Section 113. (1) It shall be incumbent upon the arbitrators that they find out the cause of difference between the couple and hold their sitting in camera under the supervision of the *Qāḍī*, wherein no one shall be present except the couple and the persons summoned by the arbitrators.

(2) The non-appearance of any one of the couple before the arbitrators, inspite of their having notice of it, shall not in any manner affect the orders passed by them.

Section 114. (1) The arbitrators shall attempt to bring about reconciliation between the couple. When the two arbitrators fail in this and find fault either mainly or completely with the husband, they shall pass orders for separation by way of an irrevocable divorce.

(2) If the fault be mainly or completely of the wife, the arbitrators shall pass orders for separation between the couple in lieu of full or part of the dower (if not paid). In case the dower is to be returned it shall be returned to the husband before the *Qāḍī* passes the order of separation.

(3) If difference arises between the arbitrators, the *Qāḍī* shall, in their place, appoint some other person as umpire, or shall appoint with them a third arbitrator after putting him on oath.

Section 115. It shall be incumbent upon the arbitrators to submit a report of their findings before the *Qāḍī*. It shall not be necessary for them to give in the report the reasons for their finding. If the report is proved to be in order it shall be incumbent upon the *Qāḍī* to give his decision in accordance with the same.

(Under the law of Syria the arbitrators have the authority to decide about separation between the couple, but their decision will be enforceable by a decree of the Qāḍī).

Conclusion :

God has used the word '*Hakams*' in the Holy Qur'ān. This word is certainly different from the word, "Representative" or Witness. Hence considering the technical meaning of the word '*hakam*' the present writer arrives at the conclusion that in this verse (IV : 35) '*hakam*' means those who make decisions, not those who have been engaged to plead on behalf of their clients. No one can deny that there is a clear distinction between the words, '*hakam*' and '*hākim*'. *Hakams* are those who pass orders between two persons or parties, who are appointed by the persons or parties concerned and who hold delegated powers with them to give their decision. Whereas a '*hākim*' is one who has the general power of deciding disputes placed before him. When '*hakams*' are appointed in a pending suit by each of the spouses or by Court on their behalf, having in view the nature of the dispute, the jurisdiction of the '*hakams*' gets determined by the Court itself. In case of private arbitration the wife, when she demands separation on the ground of cruelty and injury meted out to her the *hakams* are empowered to give decision for separation as well, provided that at the time of their appointments, such powers are given to them by the parties concerned. The decision, however, shall be made final subject to the observance of the rules of arbitration, as provided under the *Shari'ah*. The decision of '*hakams*' therefore, shall be submitted before the *Qāḍī* who, in the event of its being in accord with *Shari'ah*, shall pass orders for its being put into effect.

Indo-Pakistan Law :

Cruelty to wife : Marriage is not, in Islam, an act so irrevocable that one may be forced to stay with the wife; "You are unlucky. True you are not to blame, and you are being subjected to an intolerable life, but we cannot help it." The law gives sufficient powers to the *Qāḍī* to dissolve it in case married life is intolerable for the wife. [PLD 1957 (W.P.) Lah. 998=PLR 1958 (1) W.P. Lah. 735=10 DLR W.P. 19.] Therefore although actual habitual cruelty be not established, a decree for dissolution can be granted when considering

the circumstances it would be cruel to the wife to continue the marriage. [PLD 1958 (W.P.) Lah. 59=PLR 1958 (2) W.P. Lah. 17=10 DLR W.P. 50.] Cruelty can be physical and mental. Mental cruelty is the worst. [PLD 1963 Dacca 947 (DB).] Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse. Indeed, according to matrimonial experts, this sphere of conjugal life ought to be more sedulously guarded against psychological injuries than any other. Each spouse is entitled to expect the other to show due consideration and respect for the health, requirements, feelings, and sentiments of the other. (AIR 1965 All. 280). An isolated slap or a trival blow by a loving husband may not come within the mischief of committing cruelty provided there are adequate materials to interpret the same in a different way. The entire bundle of circumstances and the background of such occurrences as well as the effect on the life and the physical and mental well-being of the wife has to be considered in arriving at a finding whether the wife's life was rendered miserable thereby or not. (PLD 1969 Dacca 548.) No rule as to the period required to prove habitual ill-treatment can be laid down and such a presumption can arise as soon as the conduct of the husband shows that it is his habit to maltreat his wife. Habitual cruelty may be proved even by a letter written by the wife to her father. Thus, where in a suit for restitution of conjugal rights by a Muslim husband, the wife pleaded legal cruelty on the part of the husband, a letter written by the wife to her father was adduced in evidence to establish the plea. The letter ran as follows: "Today he—the husband beat me very much, I could not stand this beating. It is better that I should consider myself a widow. I would rather live without such a husband. Please come at once and take me from here or I should come with somebody or step out of the house all by myself. You please come and take me. I want to get judicial separation. As I am writing this letter I am weeping and shedding tears." It was held that the letter did not show any isolated beating but evidenced habitual beating on the part of the husband. The letter was therefore sufficient to establish legal cruelty on the part of the husband so as to disentitle him to any relief (AIR 1947 Allahabad 16).

Instances of cruelty: Cruelty can include the habitual use of abusive and insulting language to the plaintiff. The life of the plaintiff, who comes out of a respectable family and is well educated, can become miserable if the defendant were to habitually use abusive and insulting language to her. (PLD 1955 Sind 378=8 DLR W. P. Sind 1). Where a husband not merely imputed adultery to his wife but also prosecuted her under S. 494, Penal Code and attempted several times during such prosecution to get her arrested, it was held that these circumstances constituted legal cruelty

which entitled the wife to claim dissolution under Cl. (viii) (a) of S. 2. of Dissolution of Muslim Marriages Act, 1939. (PLD 1963 Dcaca 947 DB; AIR 1952 All. 145).

Disposal of wife's Property : The disposal of property which would attract the provisions of Cl. (viii) (d) of Act 8 of 1939 is disposal by a husband, without the wife's consent, of a substantial portion of her property, not for her, benefit but for his own selfish ends and in a wasteful manner, with the intention of depriving her of her property (AIR 1945 Lah. 56). It is mere disposal without any intention that makes the conduct actionable. If the disposal is with her consent, then the matter should be pursued to the full implications of that consent. If, for instances, the plaintiff allowed her husband to sell her property or even requested him to do so with the object of depositing the sale proceeds in the bank and the husband after complying with the first part of the request appropriated the money to his own use, it will constitute disposal under clause viii (d) of Section 2 of the Dissolution of Muslim Marriages Act, 1939. (PLD 1954 Lah. 614=7 DLR W. P. 87 DB). The fact that the disposal was to meet a pressing need of the husband does not make the disposal of property legitimate so as to take it out of the scope of the provision of clause viii (d) of the Dissolution of Muslim Marriages Act, 1939. [PLD 1954 Lah. 614=7 DLR W. P. 87 (DB)].

Equitable treatment of more than one wife : The neglect of a husband to maintain within the meaning of Cl. (ii) of the section one of his two wives affords the neglected wife a valid ground to claim dissolution under sub-Cl. (f) of Cl. (viii), of the Dissolution of Muslim Marriages Act 1939. [AIR 1943 Lah. 310 (DB).] Where the wife began to live separately because of the ill-treatment of the husband, and the latter did not make any effort to treat her at all, much less to treat her equitably, in accordance with the injunctions of the Qur'ān, the case falls within S. 2 (viii) (f). (AIR 1941 Sind 23=ILR 1941 Kar. 114). Therefore, where the husband had been living with another wife for 20 years so that there had been no marital life for the plaintiff (wife) for a very long time, it would be cruel to continue the marriage and the Court would grant her relief by way of dissolution of marriage. (17 DLR 687).

Conduct of wife : Where the fault is either of the wife herself or of her parents and the husband has not been permitted to treat her at all, either equitably or inequitably, the fact that the husband has married a second wife does not entitle the wife to claim dissolution under Cl. (viii) (f). [AIR 1944 All. 23=ILR 1944 All. 27 (DB)].

Suggestion :

Under the Dissolution of Muslim Marriages Act, 1939 of Pakistan, the wife has been made entitled to apply to the court demanding separation from her husband on the ground of his tyranny and cruelty to her, and the court may, on such tyranny and cruelty being proved, dissolve the marriage. It is, however, not the practice of our courts to appoint arbitrators in these proceedings.

In view of the dictates of the Holy Qur'ān the arbitrators should be appointed. By having recourse to the provisions of *Hakams*, the possibility of reconciliation may ensue. These arbitrators shall try to understand the cause of discord and try to remove it. In case there is reconciliation, so much the better. The arbitrators will, however, submit their report to the court and the court, in the light of that report, shall give appropriate decision.

Although under the Pakistan Family Courts Act, 1964 it has been made incumbent upon the courts that they make attempt to bring about compromise and conciliation between the parties and provide them with opportunities for the same, the act of bringing about compromise by the judge himself involves not only practical difficulties, but also, such a course can be expected to serve no useful purpose. It will, therefore, be advisable to introduce suitable amendments in the relevant provisions of the Dissolution of Muslim Marriages Act, 1939 and West Pakistan Family Courts Act, 1964, as stated above. In this connection, the current laws of other Muslim countries too, as quoted above, may be kept in view.

The observations of Justice Abdur Rahman in Umar Bibi's case (AIR 1945 Lah. 51) that in the present day there are no state-appointed *Qaḍīs* and since they alone could appoint *hakams*, arbitrators, the procedure laid down in the verse (IV : 35) of the Qur'ān cannot be given effect to, should not now stand in our way after the establishment of Pakistan, where it is a national and constitutional commitment to enforce the Holy Qur'ān.

The provision relating to Arbitration Council as provided in Section 7 of the Muslim Family Laws Ordinance, 1961 meets a different situation where divorce has already been pronounced. Herein, suggestion is to enforce verse (IV : 35) when there is *Shiqāq*, discord and conflict between the spouses and the wife has recourse to the Court for dissolution of her marriage.

It is further suggested that separate rules for arbitration be made under Dissolution of Muslim Marriage Act, 1939 for resolving the marital dispute, *Shiqāq*. The application of Arbitration Act, 1940, as in force in Pakistan, should be restricted to other civil suits and actions only.

A decision of Allahabad High Court, as reported in AIR 1964 All. 246, is a case in point, where it was held that in the absence of any provision to the contrary in Act VIII of 1939, a suit for dissolution of marriage, being civil in nature, would be a suit to which the provisions of Arbitration Act 1940 would apply.

Section 151. Separation effected between the couple by a Court on the ground of cruelty shall be equivalent to one irrevocable divorce.

Effect of separation on the ground of cruelty

COMMENTARY

When the court, on account of cruelty and differences between the spouses, shall order separation between them, the separation, in effect, shall be equivalent to one irrevocable divorce by the husband.²⁸ The laws as in force in Egypt, Jordan and Syria also provide the same.²⁹ As such, the payment of dower shall be incumbent upon the husband : the entire of it, if penetration has taken place; half of it if penetration has not taken place. From the date of separation the observance of the term of probation shall be incumbent upon the wife. Maintenance of the wife during the period of her probation shall also be incumbent on the husband. If the husband and the wife so desire, they may enter into a fresh marriage contract, if she has not been pronounced with two divorces earlier.

²⁸Al-Qurtubī : *Jāmi' al-Aḥkām al-Qur'ān* :

“والفراق في ذلك طلاق بائن”

²⁹See pp. 608, 610-11, *supra*.

CHAPTER XX

Separation on Account of Untraceability or Imprisonment of, or Non-maintenance by, Husband

Section 152. (1) When the husband's whereabouts have
Separation on
account of hus-
band's untrace-
ability. not been known, the wife is entitled to obtain a
decree from court for the dissolution of her
marriage.

(2) After it is established that the husband's whereabouts
have not been known the Court shall direct the wife to
wait for a further period of one year. In the event of the
husband's whereabouts remaining unknown during that period
as well, the court shall pass a decree dissolving the marriage.
The wife, then, after observing her term of probation, shall be
entitled to contract a second marriage.

(3) The directive for waiting for a year shall be given
only when necessary maintenance allowance for a year is
available there for her out of the funds or properties of her
husband or that she gets a loan in the name and on behalf of
her husband. In the event of the provision for maintenance
allowance for that period not being there and there being an
apprehension of the wife's involvement in sexual incontinence
and her falling in sin, the court shall, after the fact of the hus-
band's whereabouts not being known is established, be empowered
to dissolve the marriage forthwith without directing the wife to
wait for her husband for a period of one year as aforesaid,
reckoning the duration of suit towards the period of waiting
of one year.

(4) Dissolution of marriage, on the ground of husband's
whereabouts not being known, shall be deemed to be a revoc-
able divorce.

COMMENTARY

There are two kinds of directives under Islamic law with respect to persons whose whereabouts are not known:—

- (a) Directive with respect to inheritance from the person whose whereabouts are not known.
- (b) Directive with respect to remarriage of the wife of the person whose whereabouts are not known.

Hanafi Law :

Imām Abū Ḥanīfah, Imām Mālik and Imām Shāfiʿī are unanimous on the point that the person whose whereabouts are not known shall, with respect to his property, be considered to be alive till other persons of his age and period are living. Thus, in the event of a man's whereabouts not being known, the average age of his contemporaries in the matter of inheritance shall be relied upon. Same opinion was reportedly held by Caliph 'Uthmān. There is, however, difference of opinion with respect to the contracting of second marriage by the wife of the person whose whereabouts are not known. According to Abū Ḥanīfah and al-Shāfiʿī, the wife of a person whose whereabouts are not known cannot be considered to have been released from the marriage-tie till her husband's death is known with certainty. In other words, the marriage contract of the wife of a person, whose whereabouts are not known, according to them, is not valid as long as other men of the age of the person, whose whereabouts are not known, are alive. Another report providing the basis of the rule of conduct among the Ḥanafīs is that the death of the people of the age (of the husband) is no condition; rather it depends upon the Ruler of the State. In some cases, according to Ḥanafīs, the Qāḍī may permit the wife of a person, whose whereabouts are not known, to contract marriage with another person, even before the death of the contemporaries of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed, e.g. the husband goes on war and later there is no trace left whether he is dead or alive. Or he has to go out during death-illness and becomes untraceable. Or he goes on a sea voyage and no news of his reaching any port is received. In such circumstances, a Qāḍī, after the lapse of such time in which a strong presumption of his death may be accepted, may give a decree dissolving the marriage. Accordingly the husband shall be deemed to be legally dead and the wife, after observing her term of probation (of four months and ten days) shall have the right of entering into another marriage.

This view of the Hanafī's is opposed to Māliki law, wherein, according to Imām Mālik, the wife of a person whose whereabouts are not known, shall have the right of contracting another marriage after waiting for four years from the time of having recourse to the Court and after confirmation of decree of dissolution of marriage from the court on termination of 'iddat (term of probation).¹

Maliki Law :

According to Imām Mālik, there are four kinds of persons of unknown whereabouts :—

1. Persons whose whereabouts become unknown in an Islamic State.
2. Persons whose whereabouts become unknown in war with infidels.
3. Persons whose whereabouts become unknown after their going in an infidel country.
4. Persons whose whereabouts become unknown in war between the Muslim themselves.

For persons whose whereabouts become unknown in an Islamic State the waiting, as stated above, is four years. Concerning the persons whose whereabouts become unknown in war with infidels there are several views of Māliki jurists, as given below :

1. That the person whose whereabouts are unknown shall be deemed to be a prisoner. Till it is not known with certainty that he is dead, his wife shall remain in his marriage-bond.
2. That the person whose whereabouts are not known shall be considered to have been killed and his wife after waiting for a year may enter into another marriage contract except when she is at such a place where it is easy to get correct information about her husband. It is, then, not necessary for her to wait for a year.
3. That the wife, without waiting for the husband whose whereabouts are not known, may contract another marriage.

¹Ibn Rushd (d. 595 A.H.) : *Bidāyat al-Mujtahid*, Cairo 1369 A.H. vol. ii, pp. 43-44; Ibn Ḥazm (d. 556 A.H.) : *Al-Muḥallā*, Cairo 1352 A.H., vol. x, p. 132-42; *Fātāwa 'Alamgīrī*, Kanpur, 1932 A. D. vol. ii, p. 296; Damād Āfandī (d. 1078 A.H.) : *Majma' al-Anhur*, Cairo 1328 A.H., vol. i, p. 721; Ibn Nujaym (d. 970 A.H.) : *Al-Baḥr al-Rā'iq*, Cairo 1311 A.H., vol. v, p. 178.

4. That the husband whose whereabouts are not known shall, so far as his wife is concerned, be deemed to have been killed and in case of his property in an Islamic State shall be deemed to be a person whose whereabouts are not known.

According to some Māliki jurists the wife, whose husband's whereabouts become unknown after a battle amongst Muslims themselves shall become free from her marriage contract only after observing her term of probation without any waiting. According to some others, however, she shall have to wait for a year.²

Reason of Waiting :

It is written in *Al-Muqaddimāt* by Ibn Rushd that the reason for fixing the period of waiting to four years is based on the analogy of some opinions that the period of pregnancy, according to Mālik, is four years. This, in view of the present writer, cannot be a correct basis, as the period of waiting, in case of a slave girl's husband's whereabouts being not known, is two years. According to Mālikī the provision with respect to the period of pregnancy of a free or slave woman is one and the same. Therefore, strictly speaking, the period of pregnancy cannot be held to be its basis. Some persons are of the view that a year's waiting each is ordered on the basis of there being four well known points of compass.

Reckoning of the period :

Amongst the Mālikis, on this question, there are several points of view as to whence counting of the period of four years shall begin? According to one statement when the Qādī certifies that the husband's whereabouts are unknown, the wife should wait for the period of four years from the date of such certification. The marriage, thereafter, shall be deemed as dissolved. The woman shall then observe the term of her probation for a period of four months and ten days. According to some other Māliki jurists, the period of four years shall be reckoned from the time fixed by the court. According to a majority of them the period expired before filing in court the application to that effect shall not be counted. According to other views, more preferable is that the counting of the period of whereabouts not being known shall begin from the time which is settled by the court. Divorce shall thus take effect when four years have passed after the time settled by court and the wife shall become free from the marriage-bond after observing her term of probation of four months and ten days. She shall, then, have the right of contracting a fresh marriage at her will.

²Ibn Rushd : *Bidāyat al-Mujtahid*, op. cit. vol. ii, p. 44.

It is said in "*Al-Mudawwanatul Kubra*"^{2a} that Imam Mālik was asked if a wife waited for four years for her husband, whose whereabouts have been unknown, but without the decree of a court, whether that (period of time) would be relied upon for her eligibility for remarriage. Imām Mālik replied, "If she waited (even) for twenty years in that manner, (without the court's decree) it would not be so relied upon; but her waiting for four years from the time she filed her case in the court of a Qāḍī would be acceptable." It has been held to the same effect by Ibn 'Abdul Ḥakam in his "*Al-Mukhtaṣar*".

Mawlana Ashraf Ali Thānwi in his book, *Al-Hilat al-Najizah*^{2b}, on the basis of the Māliki *fatawā* (verdicts) has ruled that the Qāḍī shall pass a decree for four years' waiting for the wife, in case she has with her the provision of maintenance (for that period) supplied by her husband. (In other words, if there is no provision for her maintenance she shall not be ordered to wait for a further period of four years). He thus writes, "the direction for the observance of further four years' waiting by the wife (of a person whose whereabouts are unknown) is essential for the one who can pass that period with patience, forbearance and with chastity. In case it is not possible for a woman, due to fear of indulging in adultery, the official (Qāḍī) has the power of getting separation effected on one year's waiting only."

Return of the Husband :

A question arises as to what order shall be passed if the husband whose whereabouts have been unknown turns up after four years and after the decree of the court has been passed; and what shall happen if the wife, after observing her term of probation consequent to the dissolution of marriage, in the meantime contracts marriage with another persons. So far as the first question is concerned, if the husband returns at a time when the wife is observing her term of probation he may have recourse to her as the marriage has not been terminated absolutely.³ If, however, the wife after observing her term of probation has contracted marriage with another person, what shall then happen? According to a report, in the light of the decision of the Caliph 'Umar, if the husband returns before the wife contracts another marriage he shall have her as his wife (whatever

^{2a}. Al-Saḥnūn (d. 240 A.H.) : *Al-Mudawwanatul Kubrā*, Cairo, 1323 A.H., vol. ii, pp. 92, 93.

^{2b}. Mawlānā Aṣḥraf 'Alī Thānwī (d. A.D.) : *Al-Hilatul Nājizah*, Karachi, p. 110.

³Al-Saḥnūn : op. cit. vol. v, p. 133.

time may have passed). If the wife has already contracted her marriage with another person the right of her former husband lapses and he cannot have that woman as his wife, although she may not have had valid retirement with the second husband. The second perfect pact of marriage makes the right of the second husband perfect over her. Same is the point of view of Mālikis. Imam Malik has, in his book "*Muwatta*", followed this decision of 'Umar.⁴

The decision of Caliph 'Ali is at variance with the aforesaid decision of 'Umar. According to him the wife, in all events, shall be made over to the former husband inspite of her having children from the second husband.

The ruling of Caliph 'Uthman, in this respect, is stated to be that if the wife has contracted her marriage with another person and her former husband thereafter appears he shall be asked whether he wanted the return of his wife or the reimbursement of his paid dower. Action shall be then taken according to his choice. If he wanted the dower back the same shall be made to be returned to him. If he wanted his wife back she shall be made to get herself separated from her second husband and after completing her term of probation she shall be made to return to her former husband (by contracting the marriage anew). If the second husband had had cohabitation with her, he shall be made to pay her due dower as well.⁵

Conclusion :

After the study of the aforesaid assertions, the conclusions arrived at are as under :—

- (1) If the wife has not contracted another marriage and her husband returns, his right under his marriage contract shall subsist and he may enjoy the pleasures of the company of his wife.

⁴Ibid :

” قال مالك وقد بلغني ان عمر بن الخطاب قال فان تزوجت ولم يدخل الآخر يخلوا سبيل لزوجها الاول اليها (قال مالك) وهذا احب ماسمعت الى هذا وفي المفقود“

⁵Al-Bayhaqī : Al-Sunan al-Kubrā, Hyderabad Deccan, 1353 A.H. vol. vii, p. 446:

”عن سعيد المسيب عن عمر في امرأة المفقود قال ان جاء زوجها وقد تزوجت خير بين امراته وبين صداقها فان اختار الصداق كان على زوجها الآخر وان اختار امرأته اعتدت حتى تحل ثم ترجع الى زوجها الاول وكان لها من زوجها الآخر مهرها بما استحل من فرجها“ قال ان شهاب وقضى بذلك عثمان بعد عمر رضي الله عنه“

- (2) If the wife, after dissolution of the first marriage under orders of the court, has contracted another marriage and the former husband returns, his rights shall lapse totally and he cannot get back his wife.

In this connection the events that took place in consequence of the partition of Indo-Pak sub-continent may, as example, be cited here. The civil disturbances are in full swing, the husband is separated from the wife, the wife's life is some-how safe but the husband is untraceable. The presumption is that he has been killed in the tumult. The wife without going to court enters into another marriage contract. Valid retirement is also gone through. Thereafter, all of a sudden it is learnt that the former husband is alive and has come back. The question is what is to be done in such a case? The case has two aspects :—

- (i) That the wife has contracted another marriage before the expiry of four years.
- (ii) That the wife has contracted another marriage after waiting for four years and after completing her term of probation. But in both the cases the court's sanction is not obtained. What shall happen then?

In both the cases the first marriage contract shall not be held as terminated, because no order of separation has been obtained from the court. A marriage contract is a reality and a fact. The right of its termination, in essence, belongs to the husband alone. The court, in the capacity of husband's representative by virtue of his having *Walāyat 'em*, and with a view to obviate hardship, can dissolve the marriage. The marriage contracts in both the above-stated circumstances, not being taken as terminated, the first marriage contract, which is a real one and is a fact, shall continue to exist. The mere passing of time and the contracting of another marriage by the wife cannot automatically terminate it.

First Maliki View :

The jurists who are convinced of not giving the right to the wife of contracting another marriage till her husband's death is known with certainty, quote a tradition of the Holy Prophet and a few of his companions in support of their argument.

Burhan al-Din al-Marghinani has, in his noted book, "*al-Hidayah*" written, "My argument is the mandate of the Prophet respecting the wife of a person whose whereabouts are not known. That is, she will remain a wife to him till some information is received of him. The ruling of

‘Ali is that the wife of a person whose whereabouts are not known, is on trial. She has to be patient till she does learn of her husband’s death or of his pronouncing divorce to her.”⁶

Ibn Humām, the author of “*Fath al-Qadīr*”, commenting upon the above stated tradition and the ruling of ‘Ali has said that the aforesaid tradition has been narrated by Dēr Qutni in his book, “*Kitab al-Sunun*” on his own chain of authority as that “Suwar ibn Mus‘ab narrates from Mughirah ibn Sha‘bah through Shurahbīl Hamdani that Mughirah stated that the Prophet said, “The wife of a person of unknown whereabouts shall remain his wife till a statement about him is available.” In some copies of the book it is written “till an information about him is received.” But the tradition on account of its being narrated by Muhammad Bin Shurahbīl has been held to be a weak one, because Ibn Abi Hatim narrates from his father that Shurahbīl narrates disowned and obsolete traditions from Mughirah. Besides, Ibn Quṭān maintains that Suwar Ibn Mus‘ab is more notorious than Muhammad Bin Shurahbīl in narrating obsolete traditions.

The author of *Fath al-Qadīr* maintains that the author of *Hidayah* by citing the ruling of ‘Ali in face of that of ‘Umar has (infact) contradicted ‘Umar. He has preferred that narrative which has been stated by Abdul Razzaq on his own authority from Hakam Ibn ‘Utaybah (to the effect) that ‘Ali respecting the wife of a person of unknown whereabouts said, “She is a woman who is on trial. She has to be patient till she does learn of her husband’s death or of his pronouncing divorce to her.” Ma‘mar through Ibn Abi Layla has similarly reported from Hakam. He further says that Ibn Jurayj has stated that he has learnt that Ibn Mas‘ud too has agreed with ‘Ali in holding that the wife has to keep on waiting. Ibn Abi Shaḥnah has reported from Abu Qalabah, Jābir Ibn Yazīd, Sha‘bi and Nakh‘ī that the wife has no right to enter into another marriage contract as long as she does not learn of the death of the husband whose whereabouts are not known.⁷

The author of *Al-Hidāyah*, however, writes that ‘Umar had accepted the ruling of ‘Ali.⁸ The author of *Fath al-Qadīr*, one of the best commentators of *al-Hidayah* too has written that it has been stated that ‘Umar had finally accepted the ruling of ‘Ali. The same has been mentioned by Ibn Abi

⁶Al-Marghīnānī, Burhān al-Dīn (d. 593 A.H.): *Al-Hidāyah*, Karachi, vol. ii, (*Kitab al-Mafqūd*), pp. 622-23.

⁷Ibn al-Humām (d. 861 A.H.): *Sharh Fath al-Qadīr*, Cairo, 1356 A.H. vol. iv, p. 444.

⁸Al-Marghīnānī ; op. cit. vol. ii, p. 622-23.

Layla too, who has said that 'Umar accepted the ruling of 'Ali in three of his decisions, namely :

1. regarding the wife of a person whose whereabouts are unknown,
2. regarding the wife of Abu Kanaf,
3. regarding the wife who contracted marriage during the term of her probation.

It is thus written by Ibn Humām in *Fath al-Qadīr* that on these three questions we (the Hanafis) have adopted the ruling of 'Ali.⁹

Imam Abu Muhammad Ibn Hazm has also in his book, "Al Muhalla" stated some of the rulings of 'Ali which are as under :—

1. It is stated by Hakam b. 'Utaybah that 'Ali said, when the whereabouts of the husband of a woman be unknown she must not re-marry till he does return or die.¹⁰
2. It is stated by Sha'bi that 'Ali ibn Abi Tālib said, when the former husband of that woman returns he has no option but to take her as his wife.¹¹
3. It is stated by Sa'īd b. Jubayr that 'Ali said, "The wife of a person of unknown whereabouts must not re-marry because she is the wife of the former husband whether he has co-habited with her or not."¹²
4. It is stated of Ibn Jurayj that he said, "It has reached me that 'Abdullah Ibn Mas'ud agreed with 'Ali on the question of the wife of a husband of unknown whereabouts that she must wait for the husband till eternity".¹³

⁹Ibn al-Humām : op. cit. vol. iv, p. 444.

¹⁰ Ibn Hazm : Al-Muḥallā, Cairo, 1352 A.H., vol. x, p. 138 :

”عن الحكم بن العتبية قال قال علي بن ابي طالب رضي الله عنه اذا فقدت المرأة زوجها لم تتزوج حتى يقدم او يموت“

¹¹ibid: ”عن الشعبي قال قال علي بن ابي طالب رضي الله عنه اذا جاء زوجها
الاول فلا خيار له وهي امراته“

¹²ibid: ”عن سعيد بن جبير قال قال علي بن طالب رضي الله عنه ففي امرأة المفقود لا تزوج هي امرأة الاول دخل بها الاخر اولم يدخل“

¹³ibid: ”عن ابن جريج قال بلغني عن ابن مسعود انه وافق علي بن ابي طالب
في امرأة المفقود على انها تنتظره ابدآ“

Imam Bayhaqi too, has, on his own chain of authority, quoted the following assertions of 'Ali on the question of the wife of a husband whose whereabouts have not been known :—

1. It is stated from 'Abdullah al-Asadī that 'Ali has ruled about the wife of a person of unknown whereabouts, 'The wife should not re-marry.'¹⁴
2. It is stated from Hanṣh that 'Ali said, "Whatever 'Umar has said (regarding the wife of a person whose whereabouts are unknown) has no worth. The woman is the wife of her absent husband till she becomes certain either of his death or of his pronouncing divorce to her. The wife (if she contracts another marriage) is entitled to receive from the second husband her dower for the reason that he cohabited with her and her marriage with him shall be void."¹⁵
3. It is stated from Sa'id bin Jubayr that 'Ali said, "That woman is the wife of the first husband whether the second husband has cohabited with her or not."¹⁶

Second Maliki View :

The jurists who fixed the period of four years' waiting regarding the wife of the husband whose whereabouts have been unknown as against the rule of conduct of 'Ali and 'Abdullah Ibn Mas'ud, base their rule of conduct on the decision of 'Umar. Imam Abū Muhammad Ibn Ḥazm has reported in his famous book, *Al-Muhalla* several rulings from 'Umar. They are as follows :—

1. Ibn Abī Layla says that he saw 'Umar giving the husband, whose whereabouts had become unknown and whose wife has contracted another marriage, the right of choice between the wife and the

¹⁴Al-Bayhaqī, op. cit. vol. vii, p. 444 :

”عن عبدالله الاسدى عن علي رضي الله عنه قال في امرأة المفقود لا تتزوج“

¹⁵ibid: ”عن حنشل قال قال علي رضي الله عنه ليس الذي قال عمر رضي الله عنه بشئ يعنى امرأة المفقود هي امرأة الغائب حتى يا تيها يقين موته او طلاقها و لها الصداق من هذا بما استحل من فرجها و نكاحه باطل“

¹⁶ibid: ”عن سعيد بن جبير عن علي رضي الله عنه قال هي امرأة الاول دخل بها الاخر اولم يدخل بها“

dower that he had given to the wife (i. e. he could take back either the wife or the dower paid to her).¹⁷

2. Ibn Ḥazm has, on four other chains of authorities, reported the above mentioned decision of 'Umar as narrated by Ibn Abī Layla. The different versions are :—

- (a) "A husband's whereabouts became unknown. His wife appeared before 'Umar. He enquired of it from her relatives. They supported her statement. 'Umar, therefore, ordered her to wait for four years from the time of the statement made. She (thereafter) entered into another marriage contract. Later, the former husband appeared. He spoke of it (to Caliph 'Umar). According to Ibn Abī Layla, 'Umar gave him the choice of either taking back the dower or accepting back the wife. He chose to take back the dower (i. e. 'Umar told the former husband that he could accept back his wife or take back the dower that he had given to the wife). The husband chose to take back the dower."¹⁸
- (b) "Ibn Abī Layla said that the whereabouts of a husband became unknown. His wife waited for him for four years. Thereafter, she placed her case before 'Umar. 'Umar asked her to wait for four years from the time she placed her case before him. If her husband did come back so much the better, otherwise, he said, she could enter into another marriage contract. The four years (of waiting) passed away. She heard nothing of her husband during that period. She entered into another marriage contract. The former husband, thereafter, appeared. He learnt of it and went before 'Umar. 'Umar told him, if you want I shall get your wife back to you; or if you wish I may get you contracted into

¹⁷Ibn Hazm : op. cit. vol. x, p. 134 :

"عن عبد الرحمن بن أبي ليلى قال شهدت عمر خير مفقوداً تزوجت امرأة بينها وبين المهر الذي مآقه اليها"

"إن رجلاً فقد امرأة فأتت عمر بن الخطاب رضى الله عنه بعد أربع سنين :¹⁸ *ibid* : فسأل قومها فصدقوها فأمرها ، أن تعتد أربع سنين من ذى قبل ثم تزوجت فجاء زوجها وذكر الخبر قال : فخير عمر رضى الله عنه بين الصداق وبين امرأة فاختار الصداق"

marriage with another woman. The husband replied, you get me contracted into marriage with another woman.”¹⁹

- (c) “There is in a narrative a short description of a husband being taken away by some jins (genii). The report then proceeds thus: The wife intimated ‘Umar of this. He instructed her to wait for four years. The wife waited for four years. Thereafter she took her case again before ‘Umar. He, then, passed order to the effect that she might enter into another contract of marriage. The wife got herself contracted into another marriage. The former husband, thereafter, appeared. ‘Umar gave him the choice between the wife and the dower. He chose to take back his wife. The Caliph ‘Umar got separation effected between the wife and her second husband and made the wife return to her former husband.”²⁰

Although Ibn Ḥazm, besides the above, has mentioned other reports from ‘Umar but labels them incorrect. It is, therefore, not necessary to state them all.

Analysis :

Of the traditions of ‘Umar and ‘Ali the present writer finds that the decisions of the former are in agreement with the opinions of ‘Uthmān, ‘Abdullah Ibn ‘Umar and ‘Abdullah b. Abbas. These three of the Companions of the Prophet are noted jurists. From amongst the Successors of the Companions of the Prophet the names of Hasan al-Baṣrī, Khalās b. ‘Amru, Nakḥī, Zuhri, Makḥūl, ‘Umar b. ‘Abdul ‘Aziz, Sa‘īd b. Musayyib, Qatāda, Abu al-Zanad, Rabī‘ah, Awzā‘ī, Layth b. Sa‘d and Malik b. Anas are of those who concur with the decisions of ‘Umar. Among the Companions, ‘Abdullah Ibn Mas‘ud appears to concur with the decision of ‘Ali. From amongst the Successors of the Companions who concur with ‘Ali’s decision are Sha‘bi, Ibn Abi Layla, Shabrumah, Uthmān al-Battī,

¹⁹ibid: “قال : ففدت امرأة زوجها فمكثت أربع سنين ثم ذكرت امرها لعمر بن الخطاب رضي الله عنه فامرها ان تقر بص أربع سنين من حين رفعت امرها اليه فان جاء زوجها والا تزوجت فتزوجت بعد ان مضت السنوات الأربع ولم تسمع له بذلك ثم جاء زوجها فاخبر بالخبر فأتى الى عمر رضي الله عنه فقال له عمر : ان شئت رددنا اليك امراة تك وان شئت زوجناك غيرها قال : بل زوجني غيرها“

²⁰ibid: “فاخبرته فامرها ان تعتد أربع سنين ففعلت فامرها ان تتزوج ففعلت وقدم زوجها الاول فخيره عمر رضي الله عنه بين امراته وبين الصداق فاختار امرته ففرق عمر بينهما وردها اليه“

Sufyān Thawri, Ḥasan b. Ḥayy, Abū Ḥanīfah, Abū Sulaymān and others. Al-Shāfi'ī also supports the verdict of 'Alī.

So far as the tradition of the Prophet is concerned the jurists, who concur with 'Alī, themselves admit that the same is a weak one. Further, there is difference of opinion on the point whether that tradition can be used validly in support of the assertion of 'Alī and whether on this basis the assertion of 'Alī can be held to be preferable to that of 'Umar. Imām Nawawī writes in his "*Sharh al-Muslim*" that a weak tradition, though by itself is no proof, it can, however, be cited in support of the other traditions (of the Prophet or of his Companions). Ibn Humām in his book, "*Fath al-Qadīr*" describing the practice of the Ḥanafīs, in adopting the assertion of 'Alī in preference to other assertions, has held that the said tradition, inspite of its being a weak one, is preferable. Opposed to this, there are jurists who do not hold the ruling of 'Alī as preferable and say that the said tradition is not worthy of being given preference. Because the very words that have been used to state its weakness, detract from its being given preference. According to them only that weak tradition may be held as preferable, (i.e. may be cited in its support), the weakness of which does not reach the degree of its being false and repudiated. This tradition has been elaborately discussed in *Nasab al-Rāyah li Ahādīth al-Hidāyah*²¹ and *Al-Dirayah Fi Takhrīj Ahādīth al-Hidāyah*.²²

Besides, it is said of the ruling of 'Umar that the resiled later from his view regarding the wife whose husband's whereabouts have been unknown and adopted the ruling of 'Alī. But, inspite of the present writers' utmost search, it has not been possible to find any report that would prove that 'Umar had resiled from his ruling and had recourse to the ruling of 'Alī. Ḥāfiz Ibn Hajar al-'Asqalānī, too, has said in his book, '*Al-Dirayah Fi Takhrīj al-Ahādīth al-Hidāyah*' that he has not been able to find any report about 'Umar's adopting the ruling of 'Alī.²³

Ibn Humām names Ibn Abī Layla in connection with 'Umar's adoption of this ruling; but this writer has not been able to find directly any assertion of Ibn Abī Layla in this connection. Even if any such report from Ibn Abī Layla be supposed to exist, merely his assertion is not worthy of being treated as proof.

²¹Al-Zaylī: *Nasab al-Rāyah li Ahādīth al-Hidāyah*, Dabhel 1357 A.H. vol. iii, pp. 471-73.

²²Ibn Hajar Al-'Asqalānī: *Al-Dirayah fi Takhrīj al-Ahādīth al-Hidayah*, Delhi, 1350 A.H., p. 276.

²³iqid: "قد رجع عمر رضي الله عنه الى قول علي رضي الله عنه - - - اما رجوع رضي الله عنه فلم اره"

However, from the report about the views of the Companions stated above, it becomes altogether established that according to 'Umar the wife of the husband whose whereabouts are unknown should place her case before the Authority concerned and thereafter wait for four years. She should then observe her term of probation after which she shall become entitled to enter into another contract of marriage. This runs clearly against the assertion of 'Ali which lays down that the wife of the husband whose whereabouts are unknown must wait till the death of her husband or of his pronouncing divorce does become known with certainty. The dictums, in other cases decided by 'Umar, based on the fact of return of the first husband as well, disprove Ibn Abī Layla's assertion of 'Umar's having accepted the ruling of 'Ali.

The fact that stands proved from the rulings of 'Umar is that he has given the direction of waiting for four years after the institution of the suit. In other words, the period passed by the woman in waiting prior to the institution of the suit has not been taken into account by the Caliph 'Umar.

Shi'ī Law :

The *Shi'ī* law in this matter is practically the same as the *Māliki* law. When the husband is missing and nothing is known of him and when there is no one to support his wife, she can approach the *Qāḍī* who shall adjourn the case for four years and make diligent enquiry about the husband within this period. If no information is received about him within this time, the *Qāḍī* shall direct the woman to observe 'iddat as prescribed for the death of a husband and she can enter into a second marriage on the expiry of the 'iddat. If on the other hand some information is received of the husband that he has not died then the *Qāḍī* shall direct her to have patience. In such a case it is the duty of the Imam, the ruling Authority to maintain her out of the Public Treasury. If she is being maintained by someone on behalf of the missing husband she is not entitled to the dissolution of her marriage. If the missing husband happens to return at a time when his wife is observing 'iddat under the order of the *Qāḍī* then he has a right to get her back. But if she has contracted a second marriage or even when the period of the 'iddat has expired then his right to his wife is lost and he cannot get her back.²⁴

Reasoning :

The difference of opinion in this particular matter arises because of the different application of the two jurisprudential principles, *Istiṣhāb* and *Qiyās*. The principle of *Istiṣhāb* implies that a thing remains intact in its original state and subject to the law of *Shari'ah* accordingly until clear

²⁴Al-Hillī : *Sharā'i' al-Islām*, Tehran, 1377, A.H., p. 213.

proof of material change of its original state does become available. For instance, clean water is pure. It shall remain pure until it is not known with certainty that some such thing has got mixed up with it that has made it impure. Hence, the jurists who, in the event of the husband's whereabouts becoming unknown, make the right of the wife of remarrying with another man depend upon her gaining perfect knowledge of the death of her former husband, act on the principle of *Istiṣhāb*. The jurists who are convinced of giving this right of remarriage to the wife after the lapse of a reasonable period (say, four years) follow the principle of *Qiyās*. The husband's whereabouts becoming unknown, is equivalent under *Qiyās*, to *Ilā* or the husband being in prison because the wife is placed under misery (and jeopardy) on account of the husband's whereabouts becoming unknown. The underlying principle of *Shari'ah* is that the wife is not to be subjected to injury either in the beginning or at the end (for apparently no fault of hers).²⁵

Conclusion :

Under Islamic law the grounds on which the wife has been given the right of demanding separation, are, *inter-alia*, the husband's impotency, his inability of maintaining the wife, his madness etc. The right of demanding separation by the wife on these grounds is based on the principle of safeguarding the wife from injury. It is incomprehensible that the lawfulness of demanding separation from an absent husband whose whereabouts are known (e. g. in a prison) be recognised but the wife of a husband whose whereabouts are unknown, inspite of being subjected to extreme misery, must keep on waiting for the rest of her life. It is really hard and difficult for a married woman to keep on waiting for her husband during her entire life subject to abstinence. In such circumstance urging unlimited patience is against God's words, "On no soul doth Allāh place a burden greater than it can bear." (II: 286). For a wife waiting patiently till receiving the news of her husband's death may become a real cause of her involvement in sexual incontinence and in sin. Hence, the Mālikī doctrine, compared to that of Hanafī's and Shāfi'ī's, appears to be more sound.

The adoption of Mālikī doctrine, on this question, by the later Ḥanafī 'Ulamā themselves is also established. The salient points of Mālikī doctrine that have been stated in *al-Hilat al-Nājizah* are as follows :

²⁵Ibn Athīr : *Al-Nihāyah fī Gharīb al-Hadīth*, Cairo, 1311 A.H., vol. iii, p. 16;

Al-Atasī : *Shrah al-Mujalla*, Himṣ, 1349 A.H. vol. i, p. 20 and 24;

”لا ضرر ولا ضرار“ (فى الاسلام)

- (1) The wife after learning of her husband's whereabouts becoming unknown without waiting sufficiently long time applies to court and the court, after taking evidence in a regular proceeding on the matters of proof of marriage and the husband's whereabouts becoming unknown, and after notifying the same through newspapers and other sources, arrives at the conclusion that any hope of her husband being found is extinct. It shall then order the wife to wait for a further period of four years. If the husband does not appear even during these four years, the court shall then at the end of that period dissolve the marriage. Such wife, after observing her term of probation, shall have the right of entering into another contract of marriage.
- (2) However, if the wife after waiting for a sufficiently long period, applies to a court and the court in view of the real risk of the wife taking to sinful way, takes steps by means of publication etc. for the appearance or attendance of the husband, then it may order that the wife should wait for a further period of one year. On the expiry of that period the court shall dissolve the marriage and the wife after observing the term of probation shall have the right of entering into another contract of marriage.

In both kinds of circumstances, it is essential that the order for waiting either for four years, or if the wife has waited sufficiently long in the circumstance for the return of the husband for a period of one year, be issued. Indeed, according to Mālikīs, an order may as well be passed by the court that the period of four years or the period of one year be counted from the date of the institution of suit in court.

Modern Legislation :

The present law on this subject that is in force in various Muslim countries is as hereunder :—

Egypt—Qanūn No. 25 of 1929 :

Section 12. When the husband, without any reasonable cause, is absent for a year or more than a year and the wife in spite of her having the provision for maintenance is put to injury because of her husband's absence it shall be legal for her to apply to a *Qāḍī* demanding irrevocable divorce.

Section 13. When it is possible to have correspondence with the absent husband, the court shall grant time and issue a notice in his name

stating that if he does not appear before the court with the purpose of living with his wife or taking his wife with him or pronouncing divorce to her, the court shall pass a decree effecting divorce to the wife. When the time expires and the husband takes no action or his objections are not accepted the court shall get separation effected between them through an irrevocable divorce. When it is not possible to correspond with the absent husband the court shall, without issuing notice and granting time, pass a decree effecting divorce to the wife.

Iraq—Qanūn al-Ahwāl al-Shakhsiyyah :

Section 43. When the husband, without lawful cause, is absent for two or more than two years and his place of residence is unknown, inspite of the husband's property being there for the wife's use, it shall be lawful for the wife to apply to court for separation on the ground of injury.

Tunisia—Mujallat al-Ahwāl al-Shakhsiyyah :

Section 40. When the husband is absent from his wife leaving none of his property with her, making no arrangement for her maintenance and appointing no one to defray her expenses, the court shall order the husband to appear in court within a month. In case of his non-appearance, the court, after taking evidence and putting the wife on oath shall pass a decree effecting divorce.

Morocco—Mudawwant al-Ahwāl al-Shakhsiyyah :

The provisions of law as stated under section 57 (1) and (2) of the Moroccan law on the subject are in accordance with the Egyptian laws under sections 12 and 13.

Jordan—Qanūn Huqūq al-Āilāh :

The provisions of law, enunciated under sections 80 and 90 of Jordan's laws are in accordance with Egyptian law under sections 12 and 13.

Syria—Qanūn Ahwāl al-Shakhsiyyah :

Under section 109 (1) and (2) of the Syrian law the same laws are enunciated in connection with the right of demanding separation on account of husband's absence as are stated herein under section 153 relating to "Separation on account of Imprisonment" *infra*.

Analysis :

There are appreciable differences in the laws in Islamic countries relating to this subject. In Iraq the period of absence of the husband is at

the least two years, whereas in Egypt, Morocco and Jordan the period of one year is held sufficient for the right of demanding a decree of separation.

The second kind of difference, in this connection, is that in Tunisia in the event of the husband's whereabouts becoming unknown the right of demanding separation accrues only when the husband neither leaves sufficient property nor makes arrangement for the maintenance of the wife during his absence. Contrary to this in several other Muslim countries the existence or non-existence of property for meeting maintenance expenses cannot impede the right of the wife of demanding separation.

The third difference pertains to the effect and result of such separation. Under Syrian law it has been made clear that on demand of separation, in the event of husband's absence or his being in prison, such separation as shall be effected will be equivalent to the effecting of a revocable divorce; whereas in other Muslim countries such separation has been made equivalent to the effecting of an irrevocable divorce.

Pakistan Law :

Dissolution of Muslim Marriages Act, 1939 :—In Pakistan under section 2 (1) of the Dissolution of Muslim Marriages Act, 1939, the wife, in the event of her husband's whereabouts being unknown for four years, has been given the right of demanding separation from her husband through the court. The court's order has, however, been made to remain suspended for a period of six months. If the husband returns during this period of six months and is prepared to fulfil his obligations arising out of the marriage contract, the decree of the court shall not take effect.

It is interesting to note that under the English law a person was at one time presumed to be dead at such time when he would have attained an age of one hundred years. But later on, considering the hardship that was caused in some cases it was provided therein that a person would be presumed to be dead if he has not been heard of by such persons as would have normally heard from him for a period of seven years. Under certain exceptional circumstances, a shorter period was also held sufficient for the presumption of death. Thus when a person had sailed in a ship two or three years before and the ship had not been heard of since then, his death was presumed.

The Dissolution of Muslim Marriages Act, 1939, as stated above, has fixed the period of four years as the necessary period with regard to the wife for presumption of the death of a missing husband. Section 2 of the

Act provides that a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on the ground :

- (i) That the whereabouts of the husband have not been known for a period of four year ;
- (ii) Provided that a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree.

According to this clause the period of four years does not commence from the time of the *Qāḍī's* order, but begins from the time when the husband is proved to have disappeared. A wife can file suit under this provision of law at any time after the expiry of four years from the time of the husband's disappearance. Moreover, the Court shall not ask her to wait any longer but shall decree her suit if the period of four years is proved. The decree shall be held in abeyance for six months. If the husband returns within the said period of six months, the decree shall be a nullity, provided that he satisfies the court about his readiness to perform his marital obligations.

Evidence Act, 1872 :—Under Section 108 of the Evidence Act, 1872, it has been provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who should naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. In other words, if no proof of the missing man being alive is available, the court will presume that he is dead.

There is a presumption in law: when once a state of things is shown to exist the presumption is in favour of its continuance for a period for which such state of things ordinarily lasts.

Under Section 107 of the Evidence Act, if the person is shown to have been alive within 30 years of the date on which the question whether he is alive or dead arises, there is a presumption of his being alive, and the burden of proving that he has died lies on the person who asserts his death. This presumption of his being alive is, however, rebutted if it is shown that he has not been heard of for 7 years by those who, if he had been alive, would naturally have heard of him; and, on such proof being given, the

burden of proving that he is still alive is, under Section 108 of the Act, upon him who asserts that he is alive.

Rule of Muslim Law regarding Missing Person :

Under Islamic law, there are two kinds of directives with respect to persons whose whereabouts have not been known. The first kind of directives relates to :

- (i) The rule of acquiring property from others by the person whose whereabouts are not known ;
- (ii) The rule with respect to the division and distribution of the property among his heirs of the person whose whereabouts are not known.

The second kind of the directives relates to the right of contracting re-marriage with another person by the wife of the person whose whereabouts are not known.

Imāms Abū Ḥanifah, Imām Mālik and Imām Shāfi'i are unanimous on the point that the person whose whereabouts are not known shall, with respect to his property, be considered to be alive till other persons of his age and of his time are dead. Man's average age shall be taken into account in the matters relating to first kind. There is, however, difference of opinion with respect to the directive relating to second kind vis. contracting of re-marriage with another person by the wife of the person whose whereabouts are not known. According to Imām Abū Ḥanifah and Imām Shāfi'i, the wife of a person whose whereabouts are not known cannot be considered to have been released from the marriage-tie till her husband's death is known with certainty, or the persons of his age die. Another version, as well, is found in the rule of conduct of the Ḥanafis that the death of the people of the age of the missing husband is no condition. In some cases, according to Hanafis, the *Qāḍī* may permit the wife of a person, whose whereabouts are not known to contract marriage with another person, even before the death of the persons of the age of her husband on the basis of apparent circumstances in which the husband's death may strongly be presumed, such as the husband joins a war and there is no trace of him whether he is dead or alive, or he goes out in death-illness and becomes untraceable, or he goes on a sea voyage and no news of his disembarking is received. In such circumstances, a *Qāḍī*, after the lapse of reasonable time in which the strong possibility of his death may be presumed, may give a decree dissolving the marriage.

According to Imām Mālik, however, the wife of a person whose whereabouts are not known shall have the right of contracting another marriage after waiting for four years from the time of her going to Court, obtaining decree of dissolution of her marriage and observing her term of probation.

In the case of *Mazher vs. Budh Singh* (I. L. R. 7 All. 297) it was held that the matter of a missing person pertains to the law of Evidence and the Muslim Law of Evidence having been superseded, the case of a missing person shall be governed by the provisions of the Evidence Act. A wife, therefore, shall have to wait for 7 years for her missing husband whereafter he could be presumed to be dead. The period of 7 years commences from the time since when the person has not been heard of. (See Sec. 108 of Evidence Act, 1872).

The Dissolution of Muslim Marriages Act, 1939 has fixed the period for 4 years, being in effect, the period of the presumptive death of a missing person whose wife may then be entitled to obtain dissolution of her marriage with her missing husband.

Reasoning:—The reason under-lying the fixing of two separate periods for presumptive death is that in case of the dissolution of marriage of the wife of a missing husband the purpose is to save the wife from hardships whereas in case of property the fear of hardship or injury is not so imminent. It may, further, be stated that the rule of *Istishāb* is available to avert the injury and not to achieve gain. Thus, a missing person shall be deemed to be alive in respect of his own property till such time that the other persons of his age are expected to be and remain alive. He would not, however, be deemed to be alive in respect of his inheriting other's property, and his share shall be set apart as *Amānat* till such time that persons of his age remain alive.

Imāms Abū Ḥanifāh, Mālik and Shāfi'ī are all agreed on the point that the property of a missing person should not be distributed until his death is proved. There are several statements of Imām Aḥmed Ibn Hanbal in this respect. In one of his statements he agrees with the other three Imāms, whereas in another statement he holds the view that the decision of holding a person as dead will rest at the discretion of the *Qāḍī*.

Conclusion :

The law laid down under Section 108 of the Evidence Act, 1872 in as much as it fixes a period of 7 years for presumptive death without making a distinction between—

- (i) the presumption of death for purpose of dissolution of marriage of the wife of a missing person, and

(ii) the right to hold and acquire property by a missing person, is not in accordance with the accepted view of any of the schools of Muslim law or the prevalent view in the laws in force in various Muslim countries.

Suggestion :

The legislature of pre-partition India has, apparently, taken the period of four years from the Maliki *Fiqh*, yet it is based on a misconception. The passing of four years at the time of the institution of the suit, or at least at the time of passing the decree in the suit, is a condition under the current law; whereas according to Maliki *fiqh*, whatever time lapses prior to the institution of the suit shall not be taken in account, which is apparent from the decisions of Caliph 'Umar as well.

In Pakistan the decree of dissolution of marriage shall not take effect for a period of six months from the date of the decree. The present writer has not been able to find any statement or ruling in the books of *fiqh* in support of keeping a decree of court under suspension for a period of six months. The period of six months that has been fixed for putting the decree into effect apparently means that if the husband does not return for a period of six months after the decree or on return is not prepared to fulfil the marital obligations of a husband within such period, the decree shall become effective i. e. separation shall take effect and the wife shall start observing her term of probation. The question arises what shall happen if the husband returns after six months but within the period of observation of the term of probation? Under the above law it is not specified whether the decree of separation shall have the force of a revocable divorce or an irrevocable divorce.

As has been rightly observed by Ibn Rushd, the rule of Māliki *fiqh* is based on the principle of '*Ijtihād*'. The period of waiting may be fixed according to the circumstances of each case. In this age the means of communication have grown so rapidly and comprehensively as could not be imagined by the people of old times. Today the news of one's disappearance can be spread within one day throughout the country by means of radio, television and newspapers. Even his pictures can be published throughout the world.

Out of the several Māliki rulings one is stated to be that under extreme necessity the verdict of one year's further waiting may also be passed. The present writer finds this ruling to be more appropriate for the modern age and feels that the law regarding the wife of one whose whereabouts become unknown should be based on this particular ruling. Consequently, the law may be framed as under :—

"When the wife institutes a suit for dissolution of marriage the cause of action being her husband's whereabouts becoming unknown and the court after investigation finds that her husband's whereabouts have actually been unknown, it shall order the wife to wait for a further period of one year. If the husband does not turn up during that period of one year the court shall, at the expiry of that period, dissolve the marriage contract and the wife shall be entitled, after observing her term of probation, to enter into another contract of marriage:

Provided that the court may order the wife to wait for a further period of one year only in case the arrangement of her maintenance for that period has been made by her husband for her and there is no apprehension on her part of her involvement in sexual incontinence and falling in sin. In the event of non-provision of maintenance and the existence of apprehension, as aforesaid, the court shall have the power of dissolving the contract of marriage forthwith, the duration of suit being counted towards the period of waiting of one year."

Section 153. (1) If the husband is imprisoned for a period of three years or more, his wife shall, have the right after the lapse of one year from the date of order becoming final of demanding separation from her husband through the court.

Separation on
account of
husband's
imprisonment

(2) The decree of the dissolution of marriage granted to the wife by the Court on the ground of her husband's imprisonment for three years or more shall be deemed to be a revocable divorce and the husband shall have the right of having recourse to her if he is released within the period of her probation ('iddat).

COMMENTARY

There is a difference of opinion on the question whether the wife has the right of demanding separation from the husband on account of his being imprisoned. In fact, the basis of this right is the right of demanding separation by the wife on the ground of her husband's absence. The Ḥanafis, Shāfi'is and Zāhirīs are not convinced of the right of separation of the wife on the ground of her husband's absence (whose whereabouts are known).²⁶ According to Mālikis and Ḥanbalis, however, the wife has such

²⁶Al-Shafi'ī : *Kitāb al-Umm*, Cairo, 1961, vol. v, p. 239; Ibn Hazm : *Al-Muḥallā*, op. cit., vol. x, pp. 134-38.

right. According to some of the Zāhirīs and some of later Shi'ah 'Ulamā' as well, the wife, in such situation, has the right of demanding separation.

The purpose of the right of the wife of demanding separation on the ground of her husband's absence is to save her from injury. In this connection, the question of fixing the period of husband's remaining absent is based on "*Ijtihād*". The period in this regard may be fixed in accordance with the changing conditions of the society. According to Imām Aḥmad bin Ḥanbal the wife has the right of demanding separation in the event of her husband remaining absent *without any cause* for the period of six months. According to Mālikiyyah the period of three years and according to some assertions the period of one year has been fixed.

Modern Legislation :

Statutory laws for separation on the ground of husband's imprisonment have been enacted in different Islamic countries as under :—

Egypt—Qanūn al-Miṣrī, No. 25 of 1929 :

Section 14. If the husband is sentenced to imprisonment for a term of three years or more his wife after the lapse of one year of his imprisonment shall, on the ground of injury caused to her, have the right of filing an application before the *Qāḍī* praying for a decree of irrevocable divorce in spite of the fact that enough property of the husband is there with her for her maintenance. (According to this writer, this rule appears to be based on apprehension of the woman's sexual incontinence and her falling in sin).

Iraq—Qānūn al-Aḥwāl al-Shakhsiyyah :

Section 41.—If the husband is sentenced to imprisonment for a term of five years or more his wife shall have the right of filing an application before the court demanding separation.

Jordan—Qānūn Huqūq al-Āilāh :

In Jordanian law section 93 is in accordance with the Egyptian law as stated above.

Syria—Qānūn Aḥwāl al-Shakhsiyyah :

Section 109 (1). When the husband disappears without a reasonable cause or is sentenced to imprisonment for a term of more than three years, the wife, after the lapse of one year of her husband's disappearance or of his being imprisoned, shall have the right of filing an application before the *Qāḍī* praying for separation in spite of the fact that enough property of the husband is there with her for her maintenance.

(2) The separation effected shall be equivalent to a revocable divorce. If the absent husband returns or is released from imprisonment during the wife's term of probation he shall have the right of having recourse to her.

Pakistan :

In Pakistan, the wife has been given the right of demanding separation under section 2 (iii) of The Dissolution of Muslim Marriages Act, 1939 in the event of her husband having been sentenced to imprisonment for seven years or more.

Analysis :

From the above-stated law of Pakistan it appears that the right of demanding separation accrues to the wife with the sentence passed for seven years' imprisonment of the husband. The wife need not wait for any period for making the demand for separation through the Court of Law. It may, however, be added that the imprisonment be deemed to be final when all the remedies such as Appeal or Revision as provided in law have been exhausted or are barred.

Suggestion :

It shall be appropriate that the provision relating to the period of seven years' imprisonment be amended to that of three years or more. It may be pointed out that the term of three years has been prescribed under section 2 sub-section (iv) of the Dissolution of Muslim Marriage Act, 1939 in case of husband's remaining absent or in case of his not performing marital obligations, his refusal or evasion from entering into sexual relations. The period of imprisonment fixed in the statutes of other Muslim countries ranges from three to five years. The present writer has codified the law on the subject on the lines of Egyptian law, which appears to be based on Mālikī law.

Effect of separation due to imprisonment :

Separation due to imprisonment is equivalent to a revocable divorce. The husband's release from imprisonment during the wife's observance of her term of probation gives him the right of having recourse to her. Same is the rule in case of separation of the wife of one who is absent for three years.

Section 154. In case of husband's not providing or neglecting to provide maintenance to his wife for a period of six months the court may, after satisfying itself that the husband without reasonable cause refuses or

Separation due to
non-providing main-
tenance

wilfully neglects to provide maintenance to his wife, pass a decree of separation.

COMMENTARY

The non-providing of maintenance, on account of which the right of demanding separation accrues to the wife, may be due to several reasons. One is the incapability of the husband to provide maintenance due to his poverty, the other is his refusal or negligence, inspite of his capability, to provide maintenance.

The relationship of husband and wife is a sacred one. It demands continuity and permanence based on mutual co-operation, love and affection. Islam basically desires giving permanence to this relationship. In man's life ups and downs, good and bad days alternate. Islam in such circumstances urges, in the first instance, to have patience and adjust oneself to circumstances. It says that God, who places us into poverty sometimes, shall also bring affluence and comfort to us. In pursuance of this moral teaching, if the wife endures her husband's poverty and has patience over her husband's inability of providing maintenance to her, God shall grant her good recompense for the same. But in respect of the wife whose case warrants no patience and desires separation, there are several points of views as under :

1. A wife has no right of demanding separation on the ground of her husband's poverty. The Ḥanafīs, majority of the Zāhirīs, and the majority of Shī'ah Ja'farīs hold concurrent views on the point.
2. If the wife has means and can bear her own expenses no separation can be effected on the ground of her husband's poverty. This point of view is held by the Zāhirīs.
3. The wife has the right of demanding separation on the ground of her husband's poverty in the following two circumstances:—
 - (a) The husband has got means to maintain the wife, yet he neglects or refuses to maintain her,
 - (b) The husband married the wife on the pretence of his being wealthy, though he was indeed penniless.
4. The wife has the right of demanding separation in the event of her husband not providing for her maintenance. The Malikis, Shafi'is and Hanbalis hold concurrent opinions on the point.

The Hanafi Practice :

According to Hanafis, a *Qōḍī* shall not get a separation effected between the couple merely because of husband's incapability of providing maintenance to the wife. The wife shall arrange for maintenance either from her own property or by borrowing in the name of her husband till her husband has easier time. It is written in *Majma' al-Anhur* that a Qadi shall not get separation effected between the couple even in case the husband is incapable of providing maintenance or he is absent and the wife, inspite of her husband being well to do, is not provided with maintenance. The incapability of providing maintenance in any case cannot be made the basis of effecting separation.²⁷

The Hanafi's argument :

If the husband is incapable of providing maintenance to his wife no separation can be effected between them though the incapacity may arise due to poverty. The Hanafis in support of their contention rely on the Qur'anic verse: "Let the man of means spend according to his means, and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what He has given him. After a difficulty, Allah will soon grant relief."²⁸ The second argument of Hanafis is that among the Companions of the Holy Prophet there were some who were in affluence and some who were in poverty but there is not a single instance during the period of the Prophet, where separation was effected due to poverty and scantiness or non-providing of maintenance.

According to Hanafīs, if the husband, inspite of his being in affluent circumstances, avoids providing maintenance to his wife, the *Qōḍī* instead of passing an order of separation ought to pass an order for the husband's imprisonment or for providing maintenance to the wife by getting the property of the husband sold. If the non-providing of maintenance be due to the husband's poverty, the *Qōḍī* ought to pass order for waiting till improvement in the circumstances of the husband, as God says "After a difficulty Allah will soon grant relief". According to Hanafīs, therefore, if such a case is brought before a court, it ought, at the first instance, pass

²⁷Damād Afandī: *Majma' al-Anhur*, Cairo, 1319 A. H., vol. i. p. 498.

”العجز الاتفاق لا يوجب الفراق“

²⁸Al-Qur'ān, Surah *Al-Talāq* (LXV : 7)

”لينفق ذو سعة من سعته ومن قدر عليه رزقه فلينفق مما آتاه الله ، لا يكلف الله نفسا الا ما آتاها“ سيجعل الله بعد عسر يسرا“

order that the wife should meet her maintenance expenses by borrowing in the name of her husband.

Zahiriyyah's point of view :

The view of Zāhiriyyah school of law is that if the wife is rich and the husband is incapable of providing maintenance to her, she ought to arrange for her maintenance on her own.²⁹ The Zāhiriyyah, in support of their view, quote the verse from the Qur'ān, "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing, on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child. An heir shall be chargeable in the same way if they both deside on weaning."³⁰

Thus, according to the view of Zāhiriyyah, the wife, being an heir to the husband must, when the husband is incapable for providing maintenance, arrange for his maintenance too, provided the wife be capable of it.

View of three Imams :

Mālikis, Shafi'is and Hanbalīs are unanimous on the point that if the husband suffers from poverty and does not provide maintenance to the wife and the wife can no longer wait, she has the right of taking her case to the court. The court shall either compel the husband to provide maintenance to the wife or shall dissolve the marriage contract.

The three Imams argue that God by saying 'The parties should either hold together on equitable terms or separate with kindness' (II : 229) has ordered the husbands either to retain their wives on equitable terms (i. e. in proper comfort) or to put them away with kindness. Hence the husband who has no means to retain his wife in the known way (i.e. in proper comfort) must put the wife away by pronouncing divorce to her.

Analysis :

The rule of conduct of the Hanafis, that the *Qāḍī* at the first instance ought to pass an order for the provision of maintenance of the wife by borrowing in the husband's name, is involved with several practical difficulties. Ordinarily, no permanent arrangement for maintenance can be

29. Ibn-Hazam: *Al-Muhallā*, op. cit. Vol. x p. 92.

30. Al-Qur'ān Surah *Al-Baqarah* (11 : 233).

”وعلى المولود له رزقهن وكسوتهن بالمعروف لا تكلف الله نفسا الا وسعها“ لا تضار والدة بولدها ولا مولود له بولده وعلى الوارث مثل ذلك“

made on borrowing. According to the present writer, the primary duty of *Qōdī*, in such cases, is to see whether in near future, there is any possibility of borrowing or of the husband arranging maintenance or because of poverty there is apprehension of the wife being involved in sin. It shall then in the latter case be incumbent upon the court to get separation effected between the couple.

The point of view of the other three Imams that on the ground of husband's poverty and his incapability of providing maintenance, separation ought to be effected seems to be correct. Indeed it shall be better, in such circumstances, to give at the first instance, some time to the husband enabling him to make necessary provision for maintenance.

Nature of Separation :

A decree passed on husband's failure to provide maintenance to his wife shall be in the nature of a revocable divorce. If the husband during her term of probation applies to the Court that he is affluent and ready to provide maintenance to his wife he shall have the right to have recourse to the wife. It is so provided in Syrian Law also.³¹

Conclusion :

According to the present writer, the proper course shall be that if the husband, inspite of his capability, refuses or neglects to provide maintenance to the wife, the court, at the first instance, ought to order him to provide such maintenance. In case of his failing to carry out the order he ought to be sentenced to be put in jail. If, inspite of his being put in jail, the husband refuses to provide the wife with maintenance, the court, with the view of removing the harm and injury to the wife, should get separation effected between the couple.

Modern Legislation :

The wife's right of demanding separation, on the ground of non-providing of maintenance by the husband, has been recognised in various Muslim countries. In Egypt, the practice till 1929 was in accordance with the Hanafi law. But with the enactment of Act XXV of 1929 the rule of practice of the Malikis on this question began to be followed and the wife, thence on, is granted separation on the ground of husband's non-providing of maintenance. In Syria as well, the law has been framed on the same

³¹Qanūn Al-Ahwal al-Shakhsyah, Syria, Section 111 :

”تفريق القاضي لعدم الا نفاق يقع رجعيًا وللزوج ان يراجع زوجة في العدة بشرط ان يثبت يساره ويستعد لانفاق“

pattern. But in Sudan the same practice obtains as of old in Egypt. However, Sudani law grants two months time to the husband to arrange for maintenance instead of effecting immediate separation as is ordered in Egypt. Furthermore, in Syria, separation effected on the ground of non-providing of maintenance by the husband to the wife is equivalent to the pronouncement of a revocable divorce. If the husband during wife's observance of the term of probation prove to the satisfaction of the court that he is in affluent circumstances and is capable of providing maintenance to the wife or is prepared to provide maintenance to her, he shall have the right of having recourse to his wife provided the term of probation is not over.

Relevant laws as in force in the above Muslim countries are reproduced as under:—

Egypt :

Section 4. When the husband refuses to provide his wife with maintenance inspite of his being possessed of property, order shall be given for providing maintenance to her out of his property. If he is not possessed of property and it is not clear whether he is in poverty or in affluent circumstances but he insists on not providing maintenance, the *Qāḍī* shall order effecting a divorce. If the husband's inability of providing maintenance is not proved the *Qāḍī* shall order immediate pronouncement of divorce. If his inability is proved the *Qāḍī* shall grant him time, which shall not be exceeding one month. Inspite of the time granted if maintenance is not provided, the *Qāḍī* shall pass a decree of divorce.

Section 6. Separation got effected by *Qāḍī* on the ground of non-providing of maintenance by the husband shall take effect as a revocable divorce. The husband has the right of having recourse to his wife on his proving, during his wife's observance of her term of probation, that he is affluent and is prepared to provide maintenance to her. If his being affluent is not proved and his agreeing to provide maintenance is not implemented, having recourse by him to his wife shall not be valid.

Syria :

Section 110. (1) The wife has the right of making an application for the demand of separation when her husband is present, but his property has not been disclosed and it is not proved that he is incapable of providing maintenance.

(2) If the husband's incapability is proved or he is not traceable the *Qāḍī* shall allow him appropriate time not exceeding three months for

providing maintenance. If the husband does not provide maintenance during that period too, the *Qāḍī* shall get separation effected between the couple.

Section 111. Separation got effected by *Qāḍī* on the ground of non-providing of maintenance shall be equivalent to a revocable divorce. The husband shall have the right of having recourse to his wife during the observance of her term of probation, provided he proves his affluent circumstances and shows his readiness to provide maintenance.

Jordan :

Section 91. When the husband has gone in hiding or has gone somewhere on a journey and remains untraceable for a year and it becomes impossible for the wife to get any maintenance she may demand separation from him and the *Qāḍī*, after necessary investigation and proper consideration of the matter, shall order separation between the couple.

Pakistan :

In Pakistan under section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939, the wife, in the event of her husband having refused or neglected to provide maintenance to her for a period of two years or more has been given the right of demanding separation.

Rulings by Indo-Pak Courts :

Non-providing maintenance due to wife's fault: The Lahore High Court in case of *Manak Khan vs. Mal Khan* (AIR 1941 Lah. 167) has held that non providing, on whatever account, of maintenance is immaterial. In the opinion of learned judge, Mr. Becket the Section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939 supersedes the Islamic law. The same Court in another case *Akbari Begum vs. Zaffar Hussain* (AIR 1942 Lah. 92) has held that under the said section 2 (iv) the wife, in the event of the husband not fulfilling without reasonable cause the conjugal obligations for a period of three years, becomes entitled to have her marriage dissolved. The words, "without reasonable cause" in connection with maintenance, however, do not find place in the said Section 2 (ii). Hence it would be taken to mean that inspite the wife herself being held responsible for the non-providing of the maintenance (e.g. due to *nushūz*) she shall have the right to get the marriage dissolved for such non-maintenance. But Justice Lobo, a Judge of Sind Chief Court, in the case of *Mst. Khadijan vs. Abdullah* (AIR 1943 Sind 65), differing from the said decision reported in AIR 1942 Lahore 92, held that if the husband was not bound under the Islamic law to provide maintenance to the wife it could not be said that he neglected in providing her

with maintenance. The Allahabad High Court in the case of *Badrunnisa vs. Muhammad Yusuf* (AIR 1944 All. 23) followed the said decision of the Sind Chief Court. The same year, however, the Lahore High Court in another case reported in AIR 1944, Lahore, 336 over-ruled the earlier two decisions of their own and held that before finding the neglect of the husband established it ought to be seen whether the husband under Anglo-Mohammadan Law was liable, under the circumstance, to provide maintenance. Afterwards in another case viz. *Musammam Naser Bibi vs. Pir Baksh* (AIR 1950 Sind 8) the Sind Chief Court after examining in detail the previous decisions held that the husband is bound to provide maintenance to her, inspite of the wife being at fault and inspite of her refusal to live with him. The same point of view has been followed in the case reported in P. L. D. 1956 Sind 298.

The High Court of Azad Jammu & Kashmir has in the case of *Mst. Raishman vs. Shair* (PLD 1953 AJ&K. 10) held that it is essential to prove the non-providing of maintenance only. The circumstances under which the maintenance could not be provided are irrelevant. The learned court differed with the decision of A. I. R. 1944 Lahore, 336. The High Court of Baghdad al-Jadeed, however, refused to recognise the wife's right of dissolving her marriage when she herself was the cause of non-providing of her maintenance (P. L. D. 1952 Baghdad al-Jadeed, p. 47). This decision was, however, based on a Bahawalpur amendment of clause ii of Section 2 introduced by Notification No. 39 dated the 1st June 1943, according to which it was made obligatory on the Courts to see whether the wife is entitled to maintenance under Muhammadan Law and in case it is found that she is so entitled then the husband has to be given a period to change his attitude and to provide for the maintenance of his wife. If, however, he fails to do so during the appointed time then the suit for dissolution of marriage has to be decreed.

In a case of Lahore High Court *Fazal Bibi vs. Muhammad Azam* (PLD 1952 Lahore 227) it was held that the wife in the case of the dissolution of her marriage on the ground of non-providing of her maintenance has got to prove that she was living on valid grounds separate from the husband who has neglected or refused to provide maintenance to her for the last two years. The Dacca High Court as well in the case of *Ain-uddin Karikar vs. Sultanatun-Nisa Bibi* (PLD 1953 Dacca 216) held that the wife on the ground of non-providing of her maintenance has no unconditional right of demanding dissolution of her marriage. In 1952 in a Lahore case reported in PLD 1952 Lahore 460 it was held that if the husband, on account of his wife's behaviour, is not responsible for providing her maintenance, the wife shall have no right of demanding separation. In later cases reported

in PLD 1957 Dacca 242, PLD 1958 Karachi 219, PLD 1957 Lahore 871, PLD 1961 Peshawar 66 and PLD 1963 Dacca 583 the view upheld was that the wife shall be entitled to the dissolution of her marriage on the ground of non-providing of the maintenance when she proves that she was entitled to be provided with maintenance.

The maintenance mentioned in clause (ii) of section 2 of the Dissolution of Muslim Marriages Act, 1939 is the maintenance to which a Muslim wife is entitled under the Muslim Law. The Muslim Law does not confer upon a wife an absolute and unconditional right to maintenance. A wife is not entitled to dissolution of her marriage when the husband has not been paying her maintenance on account of a fault of her own. [PLD 1969 Dacca 548; PLD 1967 Pesh. 32; PLD 1963 Dacca 583=14 DLR 465; PLD 1960 Pesh. 66; PLD 1957 (W. P.) Lah. 871=10 DLR (W. P.) Lah. 11; PLR 1963 Dacca 589=14 DLR 471 (DB); PLD 1952 Lah. 460, AIR 1949 Pesh. 7(DB); AIR 1944 Lah. 336=ILR 1945 Lah. 517 (DB); AIR 1943 Sind 65=ILR 1942 Kar. 535.] The onus is on the wife to prove that her husband was bound to pay her maintenance which he failed to pay. The Court rejected the contention that unless the wife was held disentitled to maintenance on account of her conduct, it should hold that there was a failure to maintain her. [PLD 1959 (W.P.) Lah. 470=11 DLR (W.P.) Lah. 124.] The right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and the failure of the husband to provide her with maintenance would not entitle the wife to seek dissolution of the marriage-tie. [PLD 1969 Dacca 548; PLD 1967 A.J. & K. 32 (DB).]

The wife is under an obligation to obey and carry out lawful and reasonable instructions of her husband, submit herself to him and live with him in his house. [PLD 1958 W.P. Kar. 219=PLR 1958 (1) W.P. 192 (DB).] But refusal of a husband to pay maintenance to his wife on the ground of her failure to live with him would amount to default on his part to pay maintenance within the meaning of S. 2 (ii) where the wife's refusal to live with him is justified in law because of his non-payment of the dower debt decreed to her. [PLD 1959 Lah. 470; 11 DLR (W.P.) 124; AIR 1953 Mys. 145=ILR 1953 Mys. 13; AIR 1946 Pat. 467; PLD 1960 Kar. 663.] If the wife refuses herself to her husband without any lawful excuse and deserts her husband or otherwise wilfully fails to perform her marital duties she has no right to claim maintenance from the husband and if the husband in that case does not maintain the wife, it cannot be said that there is a negligence or failure to provide maintenance to the wife. Therefore dissolution of marriage cannot be claimed on failure to maintain

in those circumstances. [PLR 1963 Dacca 589=13 DLR 471 (DB); PLR 1953 Dacca 216=PLR 1952 Dacca 337=5 DLR 36.] A Muslim wife cannot compel her husband to divorce his other wife and if she refuses to live with her husband unless he divorced his other wife, there is no liability on the husband to maintain the wife and his failure to do so would not entitle the wife to a divorce under S. 2 (ii) of the Dissolution of Muslim Marriages Act, 1939. [AIR 1944 Lah. 336=ILR 1945 Lah. 517 (DB), AIR 1942 Lah. 92, (*Reversed*)].

It is therefore submitted that the earlier view that in order to succeed in a suit for dissolution of marriage all that a woman is required to do is to establish that for two years immediately preceding the suit, her husband has not provided her maintenance, and once that is established she will be entitled to a decree as matter of course, and the courts have not to go into the question whether the woman herself has contributed towards the failure of her husband to provide maintenance for her and her refusal to stay with her husband or to refuse conjugal rights to him is no ground for refusing her claim for dissolution, as expressed in PLD 1956 Sind 298=8 DLR (W.P.) Sind 51 (DB)—PLD 1953 A.J. & K. 10—PLD 1950 Sind 36=PLR 1948 Sind 108 (DB), is no more good law.

Conclusion :

The latter point of view according to *Shari'ah* law is correct. Section 2 (ii) of the Dissolution of Muslim Marriages Act, 1939 as it stands declares or establishes the right of the wife to separation for non-maintenance. It does not deal with the husband's duty and responsibility of providing maintenance. For this matter one has to look for the traditional law of the *Shari'ah*. In other words, the law as provided in sub-section 2 (ii) of Section 2 of the Dissolution of Muslim Marriages Act, 1939 declares the right of a wife to claim dissolution of her marriage in the event of her husband's failure or neglect to provide for maintenance to her for a period of two years. This was necessitated because Hanafi law, in general, did not favour this right. But so far as other incidents of Muslim law relating to the mutual rights and obligations of the spouses for maintenance are concerned, the provision of section 2 (ii) does not supersede or interfere with them.

Neglect or failure to maintain wife : There is nothing in the wording of S. 2(ii) of the Dissolution of Muslim Marriage Act, 1939 to suggest that the failure to maintain the wife must be willful. Divorce can be granted on grounds which do not necessarily involve any deliberate default on the part of the husband. It is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or to

any other cause whatsoever. (AIR 1941 Lah. 167—AIR 1946 Sind 48=ILR 1945 Kar. 327). But the right of the wife to obtain maintenance from the husband is subject to her living with him and if she refuses to live with him without reasonable cause, then she is not entitled to maintenance and failure of the husband to provide her with maintenance in those circumstances would not entitle the wife to dissolution of the marriage-tie. [PLD 1967 A.J. & K 32=19 DLR (W.P.) 104 (DB)]. Where, however, a husband ill-treats his first wife and turns her out of the house, and marries two other wives and does not pay maintenance for two years to his first wife who is living with her parents or brothers and sisters, she is entitled to a divorce. If the husband tries to take back the wife by recourse to S. 100, Cr. P. C. it cannot be said that she refused to go with him and thus lost her right to maintenance. [PLD 1968 Dacca 376=PLR 1967 (1) Dacca 281=19 DLR 751.]

Means of wife : The fact that the wife has means of her own to maintain herself is no reason why the husband should not maintain her. Therefore such a defence cannot be set up by the husband in answer to a suit for dissolution of marriage for non-maintenance of wife. (17 DLR 687).

Nature of maintenance : The duty of a husband to maintain his wife is only this that he is to give the wife food and clothing and a place for residence. Under ordinary circumstances, the food, clothing and residence is to be provided at the house of the husband and there is no failure to maintain unless the husband is not prepared or refuses to give her food and clothing at his own house. It is only in exceptional circumstances that there would be a duty cast on the husband to pay maintenance in cash. This will happen, for instance, where under his direction the wife is living separately. (PLD 1959 Lah. 470=11 DLR Lah. 124).

Defence of husband : A plea by the husband of an ulterior motive on the part of the wife is not a valid defence to a suit for dissolution of marriage brought against him by the wife under Cl. (ii). (AIR 1946 Sind 48=ILR 1945 Kar. 327).

Intermittent payments : Payment by husband of maintenance intermittently without any intention of continuing the payments cannot defeat the right of a wife to dissolution under Cl. (ii) of the Dissolution of Muslim Marriages Act, 1939. The question of husband's intention is one of fact. (AIR 1946 Sind 48=ILR 1945 Kar. 327).

Period of two years : The failure of the husband to maintain his wife should be for a continuous period of two years immediately preceding the suit and a failure for broken periods aggregating to two years or a period

of two years followed by a period during which the wife has been maintained is not contemplated by the provision of Cl. (ii). (AIR 1946 Sind 48=ILR 1945 Kar. 327). Where husband had not maintained his wife for a period of ten years but had paid her maintenance under the orders of a magistrate for some months preceding the institution of the suit and thus the default had not been for a continuous period of 2 years before the suit for dissolution was brought, the wife was entitled to dissolution of her marriage. (AIR 1941 Sind 23=ILR 1941 Kar. 114).

Where it has been established that a husband has failed to provide maintenance for his wife for a period of two years, the wife, irrespective of the fact whether she has attained puberty or not, is entitled to a decree for dissolution of marriage under section 2 (ii) of the Act. (5 DLR 527 Rel. 60 I. A. 10). It is, however, submitted that she must be physically mature for consummation.

Suggestion :

It is very often that conjugal matters taken to courts get prolonged and take years to decide. The wives are put to much trouble and misery. There exist special circumstances in our country. Here women generally do not earn their own living. Hence the condition of non-providing or neglecting to provide maintenance to the wives by the husbands for a period of two years, being necessary for giving the wives the right of demanding separation, certainly requires reconsideration. The wife ought to be given the right of filing an application demanding separation in Family Courts if the husband neglects to provide or refuses without valid reasons, to provide maintenance for a period of six months (as is the rule according to Mālikis). If the court, after examining the reasons for the non-providing of maintenance by the husband and the husband's financial circumstances, comes to the conclusion that there is no valid reason for the non-providing of maintenance and that the husband is not without means and is not ready to change his attitude it ought to pass orders for separation forthwith. If the husband is unable to provide maintenance due to his poverty and if there be reason to believe that there is no possibility of his earning livelihood in the near future, even then, the court ought to pass similar orders forthwith. If there be the possibility of his gaining the means to do so the husband ought to be given, at the least, three months time to arrange for providing maintenance. At the expiration of the period of three months if the husband is not able to prove his capacity of providing maintenance to the wife, the court ought to pass orders for separation. Besides, the existing law be amended by adding after the words, "has refused or neglected to provide maintenance", the words, "without reasonable cause" to close the door of controversy as given out in the Rulings of the Courts as discussed above.

CHAPTER XXI

Separation on account of Apostasy, Conversion to Islam and Difference of Domicile

Section 155. In the event of a Muslim husband turning apostate his marriage contract shall of itself get dissolved.

Seperation on
apostasy of hus-
band.

COMMENTARY

Meaning of Apostasy :

In general terms that person is called apostate who deserts the Islamic faith and reverts back to his former faith, or accepts some other new faith or no faith of all.¹

Husband's Apostasy and Marriage :

Muslim jurists are agreed on the point that if a husband gives a go-bye to Islām and turns apostate his marriage contract with his wife shall of itself get dissolved. A Qāḍī's decree or order of an official of the State for dissolution of marriage is not necessary.² There is consensus of opinion of the scholars of the 'Ummah on this point.

It is, however, stated in *Al-Durr al-Mukhtar* that a marriage stands dissolved if either of the married couple turns apostate. The Qāḍī's judgement (order of a court) is not required^{2a}; yet the prevalent view as emerged latterly is that the marriage on a Muslim wife's turning apostate does not get dissolved *ipso facto*. (For full discussion see section 156 *infra*).

If the husband becomes an apostate and the marriage has been consummated the wife is entitled to get the entire dower. If the marriage has not been consummated the wife is entitled to get half of the dower. If the wife becomes an apostate and the marriage has not been consummated she shall

¹Tanzīl-ur-Rahman: *Murtad Kay Ahkam*, Monthly *Al-Balāgh*, Karachi, April 1973.

²Ibn 'Ābidin (d. 1252 A. H.): *Radd al-Muḥtār*, Cairo, Vol. ii, p. 412, Chapter on 'Nikāh al-Kafir':

^{2a}Ibid. Vol. ii, p. 412.

not be entitled to get any dower. But, if the marriage has been consummated she shall be entitled to get the entire dower. If the spouses repudiate Islam together but revert back to Islam afterwards, their marriage contract shall remain intact. If, however, the wife reverts to Islam and the husband remains an apostate the marriage shall stand dissolved. If a wife who is a Believer in some revealed Book, accepts Islam but afterwards becomes an apostate or reverts back to her original faith she shall get separated from her Muslim husband. In case a Muslim male marries a Christian female and they both become fire-worshippers afterwards, then, according to Abū Yūsuf, separation shall get effected between them. Imam Mumammad Shaybāni holds a different view.³

However, if the husband relinquishes Islam and the wife stands firm in her Faith, cohabitation between them shall become unlawful forthwith. If the husband reverts to Islamic faith during his wife's term of probation they both may, as of yore, establish their conjugal relationship and no fresh marriage contract between them is needed.

The Dissolution of Muslim Marriages Act, 1939 :

Section 4 of the Dissolution of Muslim Marriages Act, 1939 brought no change in the traditional Muslim law so far as it relates to apostasy of a Muslim male. The law continues to be the same that the marriage of a Muslim male with a Muslim female shall stand dissolved on *his* apostasy.

Courts' View :

It was held in a Calcutta case that on the husband's apostasy, the relationship of husband and wife is severed and the man ceases to be the husband of his Muslim wife from the time of his renunciation of Islam. (Abdul Ghani vs. Aziz-ul-Haq, I. L. R. 39 Cal. 409; 14 I. C. 641). It is immaterial what new religion he has adopted, because a Muslim woman is not allowed to marry a non-Muslim to whatever religion or creed he may belong.

Dower and Maintenance on Apostasy :

If the husband has turned apostate before valid retirement he must pay to his wife half of her dower. If he has done so after valid retirement, he must pay her the entire dower. The observation of the term of probation is not incumbent upon the wife in case husband turns apostate prior to valid retirement. But its observation shall become incumbent on her only

³Baillie: *Digest of Muhammad Law*, Lahore, Vol. I, pp. 183-85.

after valid retirement. Besides, the liability of providing maintenance to the wife during her probation shall continue upon an apostate husband.⁴

Nature of Separation :

When the repudiation of Islam is from the husband's side there is difference of opinion among the jurists, whether it shall be classified as a divorce or a dissolution of marriage. According to Imām Abū Yūsuf the separation shall be considered to be dissolution. According to Imām Muḥammad, however, the separation shall come under the order of divorce as the separation takes effect due to the husband's resiling from Islam. The cause of separation is thus created by the husband to whom the right of pronouncing divorce belongs under the contract of marriage. Hence, if the husband denies separation the court shall intervene in the matter to remove the hardship and cruelty. In such a case the Qāḍī in getting the separation effected, shall be considered to be the deputy of the husband in the same way as he is considered a deputy of the husband if the separation is effected on the ground of his impotency. Thus, when the separation is effected due to the husband's apostasy, it shall be regarded to be in the order of divorce. Imam Abū Ḥanifah has, however, made a distinction between the two causes. According to him, if separation takes place due to husband's refusing to accept Islam, it militates against the purposes of marriage and shall, therefore, amount to a divorce, whereas husband's apostasy being inconsistent with the terms of a valid and binding contract of marriage (in Islam), the effect will be that of a dissolution of marriage.⁵

Analysis :

If the husband becomes an apostate the marriage contract between the husband and wife shall, according to Imām Abū Ḥanifah and Imām Abū Yūsuf, at once stand *dissolved*. A Court's decree is not required for the dissolution of marriage, whether the wife be a Muslim or a Believer in a revealed Book. According to Imām Muḥammad, however, if the husband becomes an apostate his apostasy shall be considered to be an *irrevocable* divorce, in as much as it is directionary act of the husband. According to him, therefore, if the husband being penitent reverts to the faith of Islam he shall have to, either during or after the wife's observation of the term of probation, enter into a fresh marriage contract. The wife, however, cannot be compelled to re-enter into marriage contract with him. The view-point of latter jurists is that in the event of the husband's reverting to the faith of Islam there is no necessity of his entering into a fresh marriage contract

⁴Fatawa Alamgiriyyah, Kanpur, *Kitab al-Nikah*, Chapter on *Nikāḥ al-kuffār*.

⁵Alī Al Khaḥfīf : *Furq al-Zuwayj*, Ābidin, 1958 p. 2.

with the same wife, provided the reversion to Islam by the husband is within the wife's period of probation. It means that according to the latter view the effect of apostasy is that of dissolution of marriage and not of an irrevocable divorce, yet co-habitation with the Muslim wife becomes unlawful immediately on his apostasy.

Section 156. A marriage contract shall not get dissolved *ipso facto* on account of the wife resiling from Separation on account of wife's apostasy her Islamic Faith, except when she being a convert to Islam gets back to the same Faith to which she belonged prior to her accepting the Faith of Islam, or accepts any other Faith.

COMMENTRY

Hanafi View :

There are three views held by Ḥanafis regarding a wife's apostasy:—

- (1) In the same way as the marriage contract gets dissolved at once on the husband becoming an apostate, the marriage contract shall get dissolved on the wife's becoming an apostate. Every attempt shall be made that the wife gets back to the Faith of Islam. If she comes back to the Faith of Islam she shall be made, under compulsion, to re-marry her former husband.
- (2) After the wife becomes an apostate she is reduced to the position of a slave girl in the eyes of Muslims. In such an event the husband ought to pay the adjudicated price of the woman to the State and have use of her in the capacity of his slave girl.⁷
- (3) On the wife becoming an appostate the marriage contract does not get dissolved. This is the verdict of the latter 'ulamā of Balkh and Samarkand.

In the present day conditions it is not possible to act according to the above-stated second view of the Ḥanafīs. The first view, though based on *Zāhir al-riwāyat* of the Ḥanafis, may be disregarded in preference to the third view. The practicability of the third view is now well settled. The circumstances in which the 'ulama of Balkh and Samarkand adopted the third view still exist. Same is the opinion of 'Allama 'Abdur Raḥmān al-Jazari expressed by him in his noted book, *Kitāb al-Fiqh 'alā al-Madhōhib al-Arba'ah*.⁸

⁷Ibn Nujaym : *Al-Baḥr al-Rā'iq*, Cairo, 1311 A. H. Vol. iii, p. 330.

⁸Abdul Raḥmān al-Jazari : *Kitāb al-Fiqh 'alā al-Madhōhib al-Arba'ah*, Cairo, 1355 A. H. vol. iv, pp. 223-24.

Maliki Rule :

There are three different views in the Māliki *fiqh* in connection with the husband becoming an apostate :

1. An irrevocable divorce shall take effect due to apostasy ;
2. A revocable divorce shall take effect ;
3. The marriage contract shall stand dissolved.

The first view is well known (probably preferred.) In case of husband's apostasy it is said that the separation shall be got effected between the husband and the wife. In case of wife's apostasy, if it is ascertained that she has done so with the intention of getting rid of her husband, she shall not be considered irrevocably divorced; rather the effect shall be contrary to her intention.

Shafi'i Rule :

The apostasy of the couple or any one of them may occur prior to or after the consummation of marriage. If it happens after consummation the marriage contract shall not break at once, rather it shall remain suspended till there is hope of his reversion to Islam. If the husband comes back to Islam during his wife's period of probation, the marriage contract between them shall subsist and continue; otherwise the marriage contract shall be considered to have terminated from the time of apostasy. If the apostasy occurs prior to the consummation of marriage contract it shall get dissolved at once. According to Shafi'i school of law there is no difference in the dictates respecting the apostasy of either the husband or the wife and that the separation between the couple shall have the effect of dissolution of marriage, not divorce.

Hanbali Rule :

The Hanbali rule of conduct on the question is in accord with the Shafi'i rule of conduct. According to Ḥanbalīs as well such a separation is in the category of the dissolution of marriage.⁹

Post-classical Development :

In connection with the dissolution of marriage on account of apostasy the point of view of classical jurists, as stated in *Fatāwā 'Alamgiriyyah* and *al-Hidāyah*, is that apostasy of any one of the couple shall make the marriage contract dissolved of itself. Indian courts, prior to the enforcement of the Dissolution of Muslim Marriages Act, 1939 decided

⁹Al-Jazari: op. cit. vol. iv, pp. 233-35.

cases in accordance with this point of view. Thus, the Allahabad High Court in the case of *Amin Beg Vs. Samin* [(1910) ILR 43 All. 90] held that if a Muslim married woman accepts the Christian faith her marriage contract under Islamic law shall terminate. Hence, the embracing of another faith by the wife was held to be a bar to the restitution of conjugal rights in a suit instituted by the husband.

However, during post-classical period of Islamic jurisprudence, there developed a difference of opinion amongst the jurists on wife's relinquishment of Islamic Faith. The point of view of the jurists of *Bukhāra* is that if the wife, after relinquishment of the faith of Islam, adopts any other faith she shall be kept in confinement till she reverts back to the Islamic Faith. She shall, thereafter, be compelled to contract marriage with the former husband. This view was necessitated to shut out the possibility of a Muslim woman's getting rid of the husband by adopting another religion. This view was based on the rule of *Siyasat al-Shar'iyyah*.

Courts' Rulings :

It was held by the Lahore High Court that the only question which has to be determined is whether renunciation has really taken place. (*Bakho Vs. Lal*, A. I. R. 1924, Lah. 397; 71 I. C. 830). It is not within the province of the Court to enquire into the genuineness or otherwise of the renunciation of the religion and that if a formal renunciation has been accompanied by the rites of the new religion such as baptism then it is immaterial whether her motive is a genuine conversion or a mere device to get rid of her husband. (*Mst. Rahmat Vs. Nikka*, A. I. R. 1928, Lah. 954; *Mst. Sardaran Vs. Allah Bakhsh*, A. I. R. 1934, Lah. 976; *Sardar Mohammad Vs. Mst. Maryam Bibi*, A. I. R. 1936, Lah. 666; 165 I. C. 383; *Mst. Saidan Vs. Sharaf*, A. I. R. 1937, Lah. 759).

A Division Bench of the Lahore High Court also held that renunciation of a religion or faith requires no other proof than a person's declaration, the only condition being that the declaration is not casual of which the declarer may repent afterwards, but it should be such as to which the declarer adheres and in which he persists and that the motive of a declarer is immaterial. (*Mst. Resham Bibi Vs. Khuda Bakhsh*, A. I. R. 1938, Lah. 482). In another case of wife's apostasy the attention of the Court was drawn to the opinion of the 'Ulma' of Samarqand and *Balkh*, but the same was not accepted. It was held that if the conversion is an accomplished fact and is not a colourable transaction then the Court cannot decline to give effect to it simply because the underlying motive is not a proper one but is a device to get rid of the husband. (*Ghaus Vs. Fajji*, 29 I. C. 857). But in another case it was held that the factum of renunciation has,

however, to be proved and on a denial of apostasy by the party concerned the marriage shall be presumed to subsist. The party alleging renunciation of Islam by the other shall have to establish the fact and failure to do so shall be fatal to his or her case. (Mst. Saidan Vs. Sharaf Ali Mohd., A. I. R. 1937, Lah. 759).

The Courts before the passing of the Dissolution of Muslim Marriages Act, 1939, followed the earlier view and held that the marriage was dissolved if the wife adopts Christianity. In a case, Agha Haider, J. seems to have been inclined to adopt the view expressed by the jurists of Balkh and Samarqand but felt himself bound to follow the decisions of his own High Court and other Courts, while he stated, "The marriage of a Muhammadan with a *Kitōbiyah* is valid. On first impression the fact that a Muslim embraces Christianity during wedlock ought not to make any difference for the obvious reason that she has gone from a religion which believes in a *Kitōb*, namely, the Muhammadan religion to another similar religion. This view has been entertained by very eminent jurists of Balkh and Samarqand, and the distinguished commentator of Muhammadan Law, the late Syed Ameer Ali, seemed to be inclined to the same view. But the concurrent judicial opinion in this country seems to be uniform and it has been held in numerous cases that if the wife of a Muhammadan who had married her husband when both of them professed the Muhammadan faith during the subsistence of the marriage abjures Islam and becomes Christian, the marriage is *ipso facto* dissolved." (Sardar Muhammad Vs. Mst. Maryam Bibi, A. I. R. 1936, Lah. 666.) The controversy has, however, been set at rest in India and Pakistan by section 4 of the Dissolution of the Muslim Marriages Act, 1939, (see section 157 *infra*).

Conversion and Indo-Pak Law :

As regards the effect of the new religion adopted, if the Muslim wife on her apostasy adopts a religion which is not considered to be a revealed religion, the marriage shall stand dissolved from the moment of her apostasy. (Sardar Muhammad Vs. Mst. Maryam Bibi, A. I. R. 1936, Lah. 666). But this view no longer holds good in India and Pakistan in view of section 4 of the Dissolution of Muslim Marriages Act, 1939, which reads as under :-

"The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not in itself operate to dissolve the marriage ;

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2 ;

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith."

This section has given effect to the view expressed by the Jurists of Samarqand and Balkh and makes it clear that the renunciation of Islam by a Muslim wife shall not effect a separation between the spouses. But the first proviso, perhaps, applies to a Muslim wife who was Muslim *originally*.

Exception :

If a Muslim wife who, prior to her marriage contract, was, for example, a Christian, a Jew or a Hindu, reverts back to Christianity, Judaism or Hinduism, the marriage contract shall get dissolved. This principle should also apply to the Muslim wife who was a convert from one Faith but after resiling from Islam accepts some other Faith or no Faith at all. It may be clarified that the marriage contract with a woman believing in a revealed Book is valid, but she should not be a convert from Islam. What is invalid at the inception shall continue to remain invalid thereafter. In fact if an infidel woman accepts the Islamic Faith prior to her marriage contract but thereafter she reverts back to her infidel state, in such a case the marriage shall stand dissolved because what is *invalid* originally, she being an infidel, shall continue to remain invalid thereafter.

Apostasy from Islam

Change after Dissolution of Muslim Marriages Act, 1939: Prior to the Dissolution of Muslim Marriages Act, 1939, apostasy of either party to a Muslim marriage operated as a complete and immediate dissolution of the marriage. (AIR 1937 Lah. 759; AIR All. 433=197 I. C. 560; AIR 1938, Lah. 482). But under section 4 of the Dissolution of Muslim Marriages Act, 1939, renunciation of Islam by a married Muslim woman on her conversion to a Faith other than Islam shall not by itself operate to dissolve her marriage, but she is entitled to obtain a decree of divorce on any of the grounds enumerated in section 2 of the Act.

This section however, has a proviso to the effect that it shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith. It means, that the second proviso applies to such Muslim woman only who having changed her faith has embraced Islam; she can get her marriage dissolved by re-embracing her former faith. She would, however, not be able to take advantage of the proviso if she embraced any faith other than the one from which she had been converted to Islam. For example, a Hindu woman converted to Islam would not be able to claim a dissolution of her marriage by embracing Christianity or Judaism.

As already stated, prior to the enforcement of the Dissolution of Muslim Marriages Act, 1939, the marriage was to dissolve on account of apostasy of any one of the couple. Since this law became operative, the marriage does not get dissolved on account of the apostasy of the wife. Specially, under section 4 of the said Act the marriage of a married Muslim woman does not get dissolved by renunciation of Islam on her conversion to a Faith other than Islam, except that she goes back to her former faith which she professed before accepting Islam. Indeed, the wife may file a suit under section 2 of the said Act for the dissolution of her marriage on the ground of her own apostasy or change of religion. But the marriage on account of husband's apostasy shall unanimously get dissolved. Section 4 of the said Act shall not apply to dissolution of marriage on account of husband's apostasy. Hence, if a Muslim husband accepts the faith of Christianity, Judaism or Hinduism or no faith at all the marriage shall terminate; and the wife after observing her term of probation may get herself married with another person. The above-said section does not also concern a married woman who being a follower of a revealed or non-revealed faith accepts the Islamic Faith and later on turns back to her original Faith. In such circumstance as well the marriage shall stand dissolved on account of that reversion.

Accordingly, the proviso to section 4 applies only if the reversion of a Muslim wife is to her former Faith. It may imply that the proviso does not apply to a case of reversion from Islam to some other Faith, say, a Hindu woman convert to Islam, resiles from Islamic Faith and (i) accepts Christianity or Judaism or (ii) accepts no Faith at all. In both these situations the said proviso should not apply and a suit for dissolution on any of the grounds mentioned in section 2 shall have to be filed by the wife.

Conclusion :

The upshot of the above discussion is that a Muslim woman after renunciation or conversion is entitled to obtain a decree for dissolution of marriage on any of the grounds mentioned in section 2 of the Dissolution of Muslim Marriages Act, 1939, except when she is a convert to Islam from someother faith and re-embraces her former faith, in which case the marriage shall get dissolved of itself.

Section 157. After the acceptance of the Islamic Faith by a non-Muslim couple or by either of them, the husband or wife acquires all the rights including the right regarding the dissolution of marriage that, under Islamic Law, accrue to a Muslim husband or wife.

Conversion to
Islam, its effect
on marriage

COMMENTARY

If the husband of a woman believing in a revealed Book accepts Islam, it does, in no way, affect his marriage contract with his wife believing in a revealed Book, because the marriage contract of a Muslim husband with a woman believing in a revealed Book is primarily valid. If a woman believing in a revealed Book accepts Islam and her husband is a non-Muslim her marriage, under the Islamic *Shari'ah*, shall break off, because the marriage of a Muslim woman with a non-Muslim, including the person believing in a revealed Book, is forbidden under the Islamic *shari'ah*. Likewise, if the married couple are Hindus and only one of them accepts the faith of Islam, the marriage contract shall get dissolved because contracting marriage of a Muslim male or female with *non-ahl-al-Kitab* is not valid.

Simultaneous Conversion : If a marriage solemnised according to the provisions of any other religion is considered as a lawful marriage under Muslim Law and if the husband and the wife embrace Islam simultaneously their marriage remains in tact and it is not necessary for them to get re-married in accordance with the provisions of Muslim Law. The domicile or place of residence, that is, whether they are living in a Muslim State or a non-Muslim State, makes no difference in this case.¹⁰

Conversion of husband belonging to a revealed religion : If the spouses belong to a revealed religion and should the husband alone embrace Islam then the marriage shall continue even when the wife does not accept Islam because a Muslim can lawfully marry a *Kitābiyah*.^{10a} (See Section 156 *supra*). In such a case, it shall not even be necessary for the *Qādi* to offer Islam to the wife.^{10b}

If it is the wife who embraces Islam, the marriage cannot be maintained or continued unless the husband also accepts Islam, because a Muslim woman cannot be the wife of any non-Muslim even when he belongs to a revealed religion.

Conversion of husband belonging to a non-revealed religion or no religion at all : It is laid down in *Fatāwā Ālamgiriyyah* that if the spouses belong to a non-revealed religion and should only the husband embrace Islam then the marriage cannot be maintained. This is based on the rule that a Muslim cannot marry a woman who is neither a *Muslimah* nor a *Kitābiyah*.

¹⁰Baillie, *Digest of Muḥammadan Law*, Lahore, 1960, vol. I, pp. 110-183.

^{10a}Fatawa 'Ālamgiriyyah, op. cit. vol. ii, p. 38.

^{10b}Ibid, p. 39.

In such a case the *Qāḍī* must ask the woman to embrace Islam. If she does so, the marriage shall be maintained, otherwise it shall get dissolved. If, however, the wife happens to be a *Kitābiyah* and does not embrace Islam while the husband does so, the marriage shall continue. ^{10c}

Conversion in Dar-al-Harb: If both the spouses happen to be domiciled in a non-Muslim territory and should one of them adopt Islam then it shall not be possible to offer Islam to the other party by a *Qāḍī*. The marriage in such a case shall stand dissolved on the expiry of the third menstrual course or three months.¹¹ It may be clarified that the marriage is not immediately dissolved so as to give time to the other spouse to adopt Islam if he or she so likes. Co-habitation shall, however, immediately become unlawful.

Conversion during temporary residence in Dar al-Islām : If the spouses are not the citizens of a Muslim country, but are staying there only temporarily and are the permanent citizens of a *Dār al-Ḥarb*, non-muslim country, and if the wife embraces Islam then it shall not be open to the *Qāḍī* to ask the other party to embrace Islam. In such a case the same law shall apply as is applicable in the case of conversion in *Dār al-Ḥarb* and the marriage shall stand dissolved on the expiry of three menstrual courses or three months if the wife is not menstruating.¹²

Effect of Domicile :

As pointed out above, Islamic law as to dissolution of marriage makes one more distinction in case one of the couple accepts the Islamic Faith. The one who accepts the Islamic Faith has his permanent residence either in an Islamic country (*dār al-Islām*) or in an infidel country (*dār al-Ḥarb*). That is to say, he is either the resident of a country where there is no impediment in the enforcement of Islamic law or he is the resident of a country where the Islamic law is not enforceable. If the resident of a country where Islamic law is in force or is enforceable upon him to request the other party either personally or through a representative to accept Islam. In the event of that party remaining silent, he ought to present Islam to that party. If the other party refuses to accept Islam, the marriage contract, after three months, shall stand dissolved.

^{10c}Fatāwā 'Alamgiriyyah, op. cit. vol. ii

¹¹Ibid, p. 40.

¹²Ibid, p. 39.

The domicile in all cases upon

periods, as the case may be, of the acceptance of Islamic Faith by the other party shall automatically get dissolved.

Indian Rulings :

The High Courts of undivided India have held in their decisions that if a Hindu woman embraces Islam, her marriage does not get dissolved thereby. If she marries another person, she would be held liable under section 494 of the Penal Code for committing the offence of bigamy. [*Government of Bombay Vs. Ganga*, (1880) 4 Bom. 330; In the matter of *Ram Kumari* (1891) 18 Cal. 264; *Mst. Nandi Vs. The Crown* (1970) 1 Lah. 440; 59 I. C. 33; *Sundari Lehani vs. Pitambar Lehani* 1904, I CWN 1903].

It was held in a Madras case that when a Hindu married woman deserts her husband, becomes a convert to Mohammadanism and adopts the habits, and lives as the wife, of a Mohammadan, then she is altogether out of the pale of the Hindu Law and ceases to have any recognised status she had according to that law. She becomes civilly dead and the marriage and her relation as a wife becomes thereby absolutely dissolved. (*Sinammal Vs. Advocate-General of Madras* I. L. R. (1894) 8, Mad, 179). A similar view was expressed in 3 M. H. C. R. 134; (1875) I Bom. 113; 3 M. H. C. R. App. VII; 4 M. H. C. R. App. III. But subsequently the Courts changed their view and held a Hindu marriage to be indissoluble. (In *Re. Ramkumari*, I. L. R. (1885) 18 Calcutta 364. The *Government of Bombay Vs. Ganga*, I. L. R. 4 Bom. 330, *Advocate-General of Madras Vs. Anada, Chari*, I. L. R. 9 Mad. 407.)

The Lahore High Court, also held in a very old case that a marriage between Hindu spouses will remain subsisting even if one of the spouses becomes a convert to Islam unless a decree for the dissolution of the marriage is passed by a competent Court. (*Mst. Nandi Vs. Crown*, I. L. R, I Lahore 440).

The view was expressed by the Calcutta High Court in a case that there is no authority in the Hindu Law for the proposition that an apostate is absolved from all civil obligations incurred before apostasy and that it would be against the spirit of the Hindu Law, which regards the matrimonial bond as absolutely indissoluble, to annul a marriage on such ground. (In the matter of *Ram Kumari*, I. L. R. 18 Calcutta 264).

The Madras High Court also held that a Hindu married woman, who on conversion to Islam marries a Muslim, is guilty of bigamy on the reasoning that the Hindu marriage is indissoluble and so subsists even after her

conversion to Islam and she remains the wife of her Hindu husband. (Budansa Rowther Vs. Fatima Bai, A. I. R. 1914 Mad. 192.)

It was held by the Bombay High Court that a Hindu marriage is not dissolved on the conversion of the Hindu husband to another religion and the wife does not cease to be the wife of the Hindu husband upon such conversion. (The Government of Bombay Vs. Ganga, I. L. R. 4 Bombay 330). The Hindu wife, however, could not contract another marriage even with a Hindu as her marriage was not considered to be effected by the conversion of the husband. As Hindu law does not allow polyandry except in certain cases the wife could be held guilty of bigamy if she contracted a second marriage when her convert husband was alive.

Probably this view was taken by the British Indian Courts on social as well political grounds for generally Hindu women with unhappy life used to accept Islam and marry a Muslim. But there is no justification in Islamic law and for an Islamic State to accept this view.

Right under Statute :

The British in order to help Christianity grow in India, had under the Native Christian Marriages Act, enacted a provision regarding dissolution of a marriage on conversion of a native to Christianity. It recognized the right of such convert to get his or her marriage dissolved on his or her conversion when the other party fails or refuses to do so. The Courts in all cases have given effect to this provision of the said Act.

After independence, the Hindu majority of India was, however, compelled to recognize under the Hindu Marriages Act, 1955 the right of dissolution of a Hindu marriage. Section 13 (11) of the Act now allows a spouse to get his or her marriage dissolved on the ground that the other party has ceased to be a Hindu by conversion to another religion.

The Rule of Muslim Law :

Islam, as already stated, does not permit a Muslim woman to marry or to remain the wife of a non-Muslim and her marriage would be automatically dissolved after her conversion to Islam on the expiry of three menstrual courses or three months. In a Muslim country, it is an essential condition for dissolution of the Hindu marriage that the unconverted party should be given an opportunity by the Qāḍī to embrace Islam if he so likes. The present Courts have taken the place of the Qadis of the early days and on an application being made by the wife, the court by its inherent powers will issue a notice to the Hindu husband to accept Islam, In

Dār al-Harb, however, the marriage stands dissolved on the expiry of three months' period without the issue of such a notice. The service of letter by the petitioner presenting Islam to defendant will be sufficient for the purpose, as equivalent for the requirement of the Muslim Law to the stipulated presentment by the Qāḍī. It may also be submitted that the absence of a Qāḍī in a country does not affect the dissolution of marriage, and advantage may be taken of the Shāfi'i law under which the marriage shall stand dissolved automatically on the expiry of three periods or three months, as the case may be.

Pakistan Law :

The High Court of Azad Jammu and Kashmir in the case of *Faiz Ali Shah Vs. Ghulam Abbas* (PLD 1952, AJ & K. 32) has held that the marriage contract of a Hindu married woman who had accepted the faith of Islam in British India, shall get dissolved after the lapse of three menstrual periods without any decree from the court.

Thus in Pakistan, which is an Islamic State, if the wife—a Hindu or Believer in a revealed Book, accepts the faith of Islam she shall, at the first instance, make an offer to her (non-Muslim) husband for the acceptance of the faith of Islam through court. If he does so it is well and good, otherwise the marriage shall be held as dissolved on expiry of three menstrual periods. If the husband believes in a revealed Book and accepts the faith of Islam while his wife remains believing in a revealed Book, the marriage contract shall remain intact. If a non-Muslim woman is the wife of a non-Muslim and she accepts the faith of Islam, their marriage contract shall, according to Islamic law, on his refusal to accept Islam, shall get dissolved and the woman, under the Islamic law, shall be entitled to enter into another contract of marriage on the expiry of her three menstrual periods. Notice through court shall however be necessary as Pakistan is an Islamic State.

Divorce Act, 1869 and Christian wife :

It cannot be denied that on a person entering the fold of Islam by uttering the words, "*Lā Ilāhā Illāllāh Muhammadur Rasūlullāh*" a change is wrought in his personal status. He becomes bound by the dictates of Islamic *Shari'ah* and is entitled to all the rights and privileges that Islam bestows upon its adherents. He can, therefore, under the Islamic law, contract marriage with another woman and can accordingly divorce his wife. In other words, if the spouses are Christians and the husband accepts the faith of Islam he has, under Islamic law, the right of pronouncing divorce to his Christian wife. But in Pakistan under the Divorce Act 1869, any Muslim who has a Christian wife or any Christian who after marrying a Christian wife accepted the faith of Islam, could not divorce

his Christian wife. If he did divorce her, it would not take effect under the aforesaid law, because the provisions of Muslim Personal Law (*Shari'at*) Application Act, 1937, regarding divorce etc. are made applicable only when both the parties are Muslim. As both the parties in the aforesaid case are not Muslims, the Islamic Law under the West Pakistan Muslim Personal Law (*Shari'at*) Application Act, 1962 shall have no application and such a divorce under Divorce Act, 1869 shall be held as ineffective.

According to all the schools of Islamic law it is settled that a Christian or a Jewish husband after accepting the faith of Islam can, if he so wishes, divorce his Christian or Jewish wife in accordance with the Islamic *Shari'at*. But, under the Divorce Act, 1869 it was not possible to do so. If it was so done the divorce remained ineffective, because, according to the Christian faith, only death could separate the couple or that the divorce might be effected under the given conditions described by the Divorce Act, 1869 itself.

Though the original *Shari'at* Application Act, 1937 was re-adopted in 1962 in West Pakistan but by keeping therein the condition of the parties being Muslims intact and adding the words "subject to the provisions of any enactment for the time being in force" the application of *Shari'at* Law was made even more restricted.

Yet, under Section 7 of Muslim Family Laws Ordinance VIII of 1961, by the use of the words "any man" in that section, every Muslim husband who is a permanent resident of Pakistan gets the unconditional right of pronouncing divorce to his wife (as the wife is governed by the Law of Domicil of her husband). The same law is thus applicable not only to the woman of foreign countries but also to a non-Muslim woman as well (believing in some revealed Book), as held by the Supreme Court in the case of *Ali Nawaz Gardezi Vs. Muhammad Yusuf*, PLD 1963 S. C. 51.

Mr. Justice A. S. Faruqi of West Pakistan High Court following the above ruling of the Supreme Court, held in the case of *Nooruddin Jatoi Vs. Marina Jatoi*, [Revision Application (Criminal Side) No. 525 of 1965], that a Muslim husband can divorce his Christian wife by pronouncing divorce to her and it will be effective under section 7, Family Laws Ordinance No. VIII of 1961. On Marina Jatoi's appeal this matter came up before the Supreme Court of Pakistan. By a majority Judgement their Lordships held that the right of the Muslim husband to grant a divorce to his wife, in respect of the marriage recognised by Muslim law, does not appear to have been taken away by any current statute in Pakistan. Therefore, the *talāq*

given by the husband to his Christian wife, in case of a marriage though solemnized in London (England) under the (English) Marriages Act, 1949, before a Registrar, had become effective.¹³

Under the rules of Private International Law, the *lex loci celebrationis*, as such, has nothing to do with the question of divorce which is a matter solely for the law that happens to be the *lex domicilii* of the parties, at the time of the suit. This may very well be different from the law that governed the solemnisation of the marriage.

In the case of Marina Jatoi the Supreme Court held that the validity of divorce had to be considered in the light of the law of Pakistan which was the law of the domicil of the husband. (PLD 1967 S. C. 580.)

There is no provision in the Divorce Act, 1869 and the Christian Marriage Act, 1872 which, in express terms, prevents a Muslim husband of a Christian woman, from having resort to his own personal law for the purpose of the dissolution of the marriage.

So far as the Muslim husband is concerned, the Muslim Personal Law on the subject of marriage, would clearly be applicable to him. In the absence of special custom or usage to the contrary, according to section 3 of the Punjab Laws Act, 1872 the law applicable to a Muslim, in respect of questions relating to his marriage, would be the Muslim Personal Law. Again, the Family Laws Ordinance, 1961, applies to all Muslim citizens in Pakistan wherever they may be. If a Muslim husband is married to a Christian woman in a form recognised by Muslim Law, or to a non-citizen Muslim woman, there is no reason why the provisions of section 7 of this Ordinance, should not apply if he wants to divorce his wife by *ṭalāq*.

There is nothing in the Muslim Family Laws Ordinance, 1961 which rules out the possibility of application of its provisions to a Muslim husband married to a Christian wife in regular form.

The latest judicial trend in England also favours the principle that if the law of the domicil permits a dissolution of marriage solemnized in England by the pronouncement of *ṭalāq* the divorce may be recognised as valid under the rules of Private International Law.

Mr. Justice Yaquub Ali in his dissenting judgment, however, wrote in Marina Jatoi's case quoted above, "That the view that a marriage between a Muslim male and a non-Muslim and non-Pakistani female may be dissolved

¹³ Marina Jatoi vs. Nooruddin Jatoi, PLD 1967, Supreme Court, 580.

by pronouncement of *talāq* can be rested on the doctrine that marriage being a matter of personal status the personal law of the husband shall apply to its dissolution. It does not, however, follow that section 7 of the Muslim Family Laws Ordinance becomes applicable to such a marriage. Section 2 is definite in terms that the Ordinance applies to Muslim citizens of Pakistan wherever they may be. The personal law status which the wife acquired as a married woman under the British Marriages Act, 1949, would not, therefore, be affected by the provisions of the Ordinance, unless an express provision was made to that effect in the Ordinance."

His Lordship further observed, "An examination of the relevant provisions of the British Marriages Act, 1949, the Pakistan Divorce Act, 1869 and the Pakistan Christian Marriages Act, 1872, brings out that a Marriage between a Muslim male and a Christian female though permitted by Islam can be performed in Pakistan under Act XV of 1872 and to that extent the application of personal law stands excluded by statute. Reference may be made to section 5 of the Punjab Laws Act and other similar enactments and Regulations prevailing in other parts of undivided India. It is for this reason that a Christian female is usually converted to Islam before being married to a Muslim male. Consequently a marriage between a Muslim male and a Christian female can be dissolved only under the Divorce Act and not by pronouncing *Talāq* under the personal law of the husband. The language employed by the Legislature in section 2 of the Act viz. "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner or respondent professes the Christian religion" has, therefore, to be construed in the sense that if one of the parties to the marriage professes the Christian faith the marriage can be dissolved only by a decree of the Court under the Act and not otherwise. A contrary view would lead to anomalous results, such as, if a Muslim husband petitions to Court under the Divorce Act for dissolution of his marriage with a Christian wife he shall have to prove to the satisfaction of the Court that she has been guilty of adultery and shall also be obliged to pay her alimony *pendentelite* and cost of the suit as well as permanent alimony on obtaining a decree for dissolution. On the contrary if the Muslim Law applies he can avoid all these obligations by pronouncing *talāq* and bringing to an end the marriage by his unilateral act. No husband would, therefore, ever make resort to a Court for dissolution of marriage. The question is whether it would be reasonable to attribute such equivocation to the Legislature in enacting Act IV of 1869."

Mr. Justice Yaqub Ali further observed that "under the Christian Marriages Act, 1872, which is complementary to the Divorce Act of 1869 a person professing the Christian faith can alone be appointed Marriage

Registrar. How can the two marriages, therefore, be treated alike in the matter of conferring a personal status on the husband and wife? A marriage performed under either of the two Acts is, therefore, a Christian marriage and on no principle can it be deemed to be a Muslim marriage for the purposes of dissolution by pronouncement of *talāq*." Mr. Justice Yaqub Ali thus came to the conclusion that "a certificate marriage performed by a Superintendant Registrar under the British Marriages Act, 1949 cannot be assimilated to a Muslim Marriage liable to be dissolved by pronouncement of *talāq*."

Conclusion :

On the basis of this majority judgment, however, a Muslim husband of a Christian wife stands immune from the operation of Divorce Act, 1869, in matters which are covered in the Muslim Family Laws Ordinance, 1961, namely, Registration of Marriage, polygamy, Talaq, Dissolution of Marriage otherwise than by Talaq and wife's Maintenance and marriageable age etc.. It means that a Muslim husband married to a Christian wife will continue to be governed in matters, except as above, to the provisions of the Divorce Act, 1869, such as paying alimony to his wife (Section 37), even after dissolution of marriage, custody of children (Sec. 41), and a Christian wife of a Muslim husband may invoke the jurisdiction of the Courts and seek her remedies against her Muslim husband in all matters detailed under the provisions of Divorce Act, for example, alimony, custody of children, re-marriage etc. which are not in accordance with *Shari'ah*. The wisdom of the legislators of the Divorce Act, 1869 cannot be doubted but in consequence of the latest law as pronounced by Supreme Court of Pakistan in Marina Jatoi's case, it will certainly lead to anomalous results in several other matrimonial matters as pointed out above.

Suggestion :

In my humble view, therefore, to avoid all these anomalies, it is expedient if the Divorce Act, 1869 is restricted in its application to cases where both the parties profess Christian religion.

It would, therefore, be advisable if the word "or" occurring after the word "petitioner" and before the word "respondent" in Sec. 2 of the Act is substituted by the word "and". The relevant provision may thus be amended as under :—

"Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner and respondent profess the Christian religion." OR "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where both the parties profess the Christian religion."

One may obviously ask about the law, procedure and forum to which a Christian wife of a Muslim shall then be subject to, if the applicability of the Divorce Act, 1869 is restricted to Christians only. The difficulty arises out of the fact that in the various Muslim Personal Law (Shari'at) Application Acts (the latest of the series being the West Pakistan Muslim Personal Law (Shari'at) Application Act, 1961), the relevant provisions are specifically made applicable where the parties are Muslims. A significant departure from this rule has, however, been made in the Muslim Family Laws Ordinance 1961, which is apparently designed to cover "every marriage solemnised under Muslim Law" as is laid down in Section 5 thereof. The original Muslim Law makes no such distinction. If the pure Muslim Law of Marriage, Divorce, Maintenance is applied in Pakistan it would also embrace in its applicability a Christian wife married to a Muslim. The right of getting the marriage dissolved by a Christian wife of a Muslim husband is recognized under the provisions of Islamic Law. So a Christian wife of a Muslim husband may seek dissolution of her marriage on all the grounds recognised under Islamic Law for a Muslim wife which also includes Khul'a and *mubārāt*.

Under these circumstances, the appropriate step would be to incorporate by Statute the same rights to Christian wife of a Muslim husband as enjoyed by a Muslim wife under Islamic Law, and thus the applicability of Muslim Law of Marriage, Dissolution of Marriage, Maintenance of the wife and children would be extended to a Christian wife of a Muslim husband. The Divorce Act, 1869 may then be left exclusively to operate in the field where both the spouses profess Christianity as their religion.

The Dissolution of Muslim Marriages Act, 1939 as applied to "a woman married under Muslim Law" entitles the woman to obtain a decree for the dissolution of her marriage on any one or more grounds, mentioned in Section 2 of the said Act. It may provide to a Christian wife seeking dissolution of marriage from her "Muslim" husband a far wider range of the grounds for dissolution of marriage than the limited sphere of the Divorce Act, 1869. There can be no dispute about the proposition that a Christian woman can be validly married under 'Muslim Law' to a Muslim. There is now no ambiguity also that a Muslim husband can divorce his Christian wife by pronouncing *talāq*. Further, the hurdle caused by Section 4 of the Christian Marriage Act, 1872 that "Every marriage between persons one or both of whom is or are a Christian or Christians solemnised otherwise than in accordance with the provisions of the said Act shall be void", may easily, be removed if the provisions of the Christian Marriages Act, 1872 are also restricted to Christian spouses *only*.

It is, therefore, necessary that the relevant sections of Divorce Act, 1869 and Christian Marriages Act, 1872 be examined and wherever such anomalies with respect to the rights of a Muslim husband and his Christian wife be found that are contradictory to Islamic Law they ought to be duly removed.

Section 158. (1) A marriage will not be considered to be dissolved automatically on account of a difference of domicile. The aggrieved spouse shall, however, be entitled to apply to the Court for dissolution of his or her marriage, as the case may be, on that account, and the court may, dissolve the marriage, on being satisfied that the other spouse has permanently settled in a *Dār al Harb*, (non Muslim State) and has no intention of coming to *Dār al Islām* and is avoiding to perform marital obligations due to the other spouse, thereby frustrating the object of marriage.

(2) The decree of dissolution of marriage passed by the Court on account of difference of *Dār*, (domicil) shall be in the nature of a revocable divorce, and if the husband comes to the *Dār al Islām* within the period of *'iddat* of his wife and declares his intention of permanently residing in *Dār al Islām* the court shall set aside or modify the decree, as it considers necessary.

COMMENTARY

Definition of "domicil"

Domicil may be defined as the place in which a person has voluntarily chosen the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, and he has no other idea than to continue there, unless he belongs to separate privileged community immune from the local jurisdiction and is subject, in matters of personal status, to his own Personal Law, allowed by the sovereign of the domicil, to be applied to certain persons domiciled in that territory.

Scope of Personal Law :

The question which has assumed general importance these days is whether a person with regard to his matrimonial matters falling within the

domain of Personal Law is to be governed by his Personal Law, irrespective of the fact of his domicile and if so, the criterion should be his domicile, nationality, or religion. In the modern world, generally speaking, it has been ruled that the personal law will be subservient to the law of domicile which denotes connexion with a territorial system of law, applicable country-wise; whereas Islamic *Sharī'ah* considers all the Muslim countries as one *Dār*, Domicil, called *Dār al-Islam*, and the non-Muslim countries as a different *Dār*, called *Dar al-Ḥarb*.

Effect of difference of Domicil :

The effect of difference of domicile was referred to in the preceding section relating to conversion. Here the point is discussed in some detail. It is, however, deemed necessary first to re-state the modern concept of domicile prevalent in the Western world, particularly England, most of the European countries and the United States of America. Recent decisions have established that it is the *lex loci domicilii* that governs the matrimonial causes. The importance of the law of domicil lies in the fact that it determines the jurisdiction of Courts in matrimonial matters, such as essential validity of a marriage, divorce, legitimization of children and wills.

Some Important Rules :

The following are some of the important rules governing the law of domicile as enunciated mostly by English Courts :

1. A domicile gets constituted by one's actual residence at a place with an intention to settle there permanently.
2. No one can be without a domicile; it may either be a domicile of origin which is ascribed to every person on birth, or a domicile of choice by one's abandoning his domicile of origin, or of necessity arising out of a woman's marrying a man of a different domicile than hers.
3. A person retains the domicile of origin until he changes it. The domicile of origin does not lapse absolutely on acquisition of a domicile of choice. It only remains in abeyance and revives automatically once the domicile of choice is lost and no other domicile has been acquired.
4. No one can have two domiciles simultaneously.
5. Domicil of origin is more stable than nationality.
6. There is a presumption in favour of an existing domicile. Therefore, the burden of proving a change lies in all cases upon

those who allege that a change has occurred [In re Lloyd Evans, (1947) Ch. 695].

7. The change of domicile is not dependent on change of nationality. Similarly, a change of domicile is not a condition of naturalization and naturalization does not necessarily involve a change of domicile.
8. A woman immediately on her marriage acquires the domicile of her husband for the duration of her coverture if her domicile is not the same as that of her husband at the time of her marriage. The domicile of a married woman, thus, changes and goes on changing with the domicile of her husband. Thus, if a husband happens to change his domicile the wife shall be presumed in law to have also changed her domicile. This kind of domicile has been termed by Cheshire, a well known writer on Private International Law, as the Domicil of Disability, or one may call it a *Domicil of Necessity*, as it is presumed that a wife always lives with her husband.
9. A married woman cannot, during coverture, have a domicile different from that of her husband.
10. In England and the United States under the law of domicile which governs matrimonial causes, a wife shall be presumed to be living with her husband even if the husband deserts her and establishes a domicile in a foreign country. (Herd Vs. Herd, (1936) 2 All. E. R. 156). Actual residence of the wife signifies nothing and shall not, in ordinary circumstances, be set up against the presumption of law that the wife resides with her husband. Thus if an English woman marries in England a foreigner then she loses her English domicile and acquires the domicile of her husband. If the husband returns to his own country while the wife remains behind, even then she shall retain the domicile of her husband. Should the husband desert her then too the domicile acquired by her on marriage is retained. Thus, where a husband domiciled in Scotland married a woman there, and then went to a foreign country where he lived for more than twenty years till the time of his death, and acquired a domicile there, it was held that the wife also acquired that domicile. [Lord Advocate Vs. Jaffery (1921) 1 A. C. 146 (H. L.)]. In this case the wife had never gone to the foreign country and remained all along in her own country where she was married and yet the foreign domicile was attributed to her.

11. The wife retains her acquired domicile on the death of her husband or on divorce until she changes it by acquiring another domicile: [Re: Scullard Estate, (1956) 3 All. E. R. 898; Re: Wallach (1950) 1 All. E. R. 199]. If she separates from him, settles at another place with an intention to live there permanently, even then her domicile shall remain the same as that of her husband. But if the husband dies then effect would be given to her new domicile of choice. Her change of residence with an intention to live there permanently shall be given effect to in such a case.

12. A married woman on her marriage loses her own domicile and acquires that of her husband. She cannot, as a general rule, sue her husband in her own country, but must go to the country to which he belongs and sue him there. The English law on this matter is so strict that it holds that the wife retains the husband's domicile even when the marriage is terminated, unless she acquires a new domicile of choice.

An American wife may, however, acquire an independent domicile only with the consent of her husband or when it is necessary or proper for her. Hence she can acquire an independent domicile when her husband deserts her or is otherwise guilty of misconduct. (Brown vs. Brown, 164, 111, App. 589; Perkins vs. Perkins, 225 Mass. 82; Sneed vs. Sneed 14, Ariz 17.) She can seek a divorce in the State of her domicile even when the husband is not living there, and is domiciled in a different State. If the wife is living separate from her husband due to her own fault then she cannot acquire an independent domicile. (Williamson vs. Osenton, 232 U. S. 619.)

13. An English woman or a woman domiciled in England who marries in England a person domiciled in Scotland, Ireland or India acquires by the status of marriage the domicile of the husband, and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the laws of his domicile, and then to that extent only. (The King vs. Hammersmith, Superintendent Registrar of Marriages, Ex-parte Mir Anwar-ud-din. (1917) 1 K. B. 634 at p. 643.)

Basis of the rule :

The underlying consideration for the concept of a married woman's domicile is that :

(1) *A woman on her marriage shall live with her husband and so her domicile shall be the same as that of her husband.*

Comment :—It is submitted that if the wife never goes to her husband's domicile and continues to live in her own country then the basis of the rule does not remain valid. Similarly, when a husband deserts his wife and leaving her in her own country goes to the place of his own domicile or acquires a new domicile and the wife never follows him, the rule will then lose all its importance. In such cases, the rigidity of enforcing the rule that domicile of the husband is the domicile of the wife and thus denying her the relief in the country of her own domicile (which factually is different from the domicile of her husband) will undoubtedly cause great hardship and untold misery to the wife and it may amount to denying justice to her. The difficulty created by this artificial concept of domicile is illustrated in various decision of English Courts.

(2) Another reason in support of the concept is that if a woman, *is on her marriage allowed to retain her own domicile different from her husband, it will result in courts of different countries having simultaneous jurisdiction over them which will cause confusion.*

Comment :—It is submitted that conflict of jurisdiction can not thus be avoided in all cases. Moreover, the concept of conferring jurisdiction on courts is a means to an end i. e. justice. If justice suffers the concept of jurisdiction should not be allowed to work against this paramount consideration. The age-old norms of deciding a case according to justice, equity and good conscience should furnish a guide-line in case of conflict between the laws of different actual domicile of the parties.

Thus, there appears to be a genuine need for reviewing the prevalent rules of domicile specially in the field of family relations including the laws relating to will and inheritance. It will not, perhaps, be improper to quote Phillimore from his noted work "Commentaries upon International Law" (iv, pp. 627-28) where he, objecting to the rules of applicability of the law of domicile (on wills) says, "England and North American United States unwisely and arbitrarily and unphilosophically compel the testator to adopt the form prescribed by the *lex domicilli*". An English Court also observed: The English Courts look to the law of domicile to determine status. The Courts have a discrimination and may in a proper case refuse to recognise a status conferred by or imposed upon a person by the law of his domicile and will reach the decision with due regard to common sense and some attention to reasonable policy." [Indyka vs. Indyka, (1967) 2 All. E. R. 689.]

Pakistan View :

The Supreme Court of Pakistan held in a case that the law of Pakistan, the law of the domicile of the husband—shall apply to determine the

character of marriage. (Mrs. Marina Jatoi vs. Nuruddin K. Jatoi, P. L. D. 1967 S. C. 580).

The wife, therefore, becomes subject to the Muslim law on her marriage to a Muslim. A Muslim country shall apply its own law in a particular case on the basis that the wife also has her domicile in that Muslim country and shall be governed by its law. As stated before, Muslim law does not recognise domicile in the context of modern concept, to be the governing rule. It may thus happen that a Muslim marries an American woman whom he can subsequently divorce according to his personal law. An English or an American Court will not recognise *Talāq* (Muslim's unilateral divorce). The American Courts, however, recognize the validity of a divorce validly granted by a foreign Court, provided it is not against the public policy of the United States or does not violate the American procedural law. The result is that English or American Courts of Law will not recognize the validity of divorce which is pronounced under the *Shari'ah*. Such divorce shall, however, be considered valid by a Muslim country or where the Muslims are to be governed by their own personal law.

English Law Amendment :

Probably it was due to the decision in *Marina Jatoi's Case* (PLD 1967 S. C. 530) that the law relating to such marriages was further amended in England. According to the Nullity of Marriages Act, 1971 of England as amended by the Matrimonial Proceedings (Polygamous Marriages) Act, 1972, Section 4, the marriage entered into in a country which permits polygamy by someone who is domiciled in the United Kingdom, shall be void, even though at the time of the marriage he had no spouse additional to the one whom he married. Its effect is that if a Muslim marriage takes place in Pakistan between a Muslim woman who is ordinary resident of Pakistan, and a Muslim man who is domiciled in Britain, his marriage being potentially polygamous is held to be void. Thus if a Muslim domiciled in India marries a woman domiciled there in polygamous form in India and subsequently goes through a ceremony with another woman in England, or subsequently acquires an English domicile and goes through a ceremony with another woman in India or elsewhere, the second wife could obtain a decree of nullity on the ground of bigamy, because her husband having acquired English domicile was subject to the law of England and could not contract such a marriage.

The Muslim Jurists' View :

The Muslim jurists in the early stage of the development of *fiqh* classified the countries into two categories : (i) *Dar al-Islam* and (ii) *Dār al-Harb*. In the words of Holy Prophet, (Peace be upon him), the

world is divided into two nationalities: one *Ahl-al-Islam* and the other *Ahl-al-Kufr*, i. e. Muslims and non-Muslims (infidels). *Dār al-Islām*, strictly speaking, means a country where the Muslims are in power and there is no impediment in their way for promulgating and enforcing Shari'at Laws; whereas *Dār al Ḥarb* means a country where non-Muslims are in power who may enforce their own laws and the laws of Shari'at are not enforceable. For a non-Muslim country to be at war or in the state of war with a Muslim country is no ground for its being a *Dār al Ḥarb*. The sole criterion to judge whether a country is *Dār-al-Islām* or *Dār-al-Harb* is to see (as to who wield power,—the Muslims or the non-Muslims and who can oust the other from its territory. A non-Muslim country will not turn into *Dār-al-Islām* simply because Muslim inhabitants of or immigrants to that country are living peacefully, or certain rituals and practices to be observed by the Muslims under the Shari'ah, are allowed with the permission of the Ruler.

In view of the above discussion, the question whether Germany, Russia, France, Canada, Austria or the United State of America are *Dar al-Harb* or *Dar-al-Islam*, can be easily answered that they in no event can be considered as *Dār al-Islam*.

There exist separate rules and commandments in the *Shari'ah* governing the *Dār al-Islam* and *Dār al-Ḥarb* respectively, in various fields of law, including the personal law of the Muslims. It has been considered most reprehensible in the eye of Shari'ah for the Muslims to adopt the way of life of the non-Muslims, particularly in the social sphere.

So far as the effect of difference of *Dār* (domicil) is concerned, it is particularly relevant for our purpose to discuss here the issue as governing the law of marriage and divorce.

Kinds of domicil in Islam :

The Muslim jurists have classified difference of *Dār* (domicil) into two categories, namely: (i) Factual difference and (ii) legal difference. These are called in *fiqh* terminology as *Tabāyun al-Ḥaqiqi* and *Tabāyun al-Hukmi*, respectively. For example a husband is permanently residing in *Dār al-Islam*, whereas his wife is permanently settled in *Dār al-Ḥarb*. This is the example of factual difference of *Dār*. But if he or she comes to *Dār al-Islam* with the permission of the Muslim state and resides there temporarily while the other spouse remains behind in *Dār al-Ḥarb*, it will be merely a case of *Tabāyun al-Hukmi*, legal difference.

Dissolution of marriage:

Muslim jurists have held that a marriage may be dissolved in case there is factual difference of *Dār* between husband and wife but not in a case where the difference is merely legal. The reason is obvious. When both the spouses permanently reside in one country, whether *Dār al-Islam* or *Dār al-Ḥarb*, there is no difference of *Dār*; but if one of the spouses actually resides in *Dār al-Islam* and the other in *Dār al-Ḥarb*, the other party will not be subject to Muslim Law, which will create practical difficulties and the object of marriage may itself be frustrated. The parties being subject to different laws will face difficulties in continuing with *marital relationship*. They may be, under different laws, subject to the incidence of different martial obligations and other matters incidental thereto such as custody of children, will, inheritance. That is why, Muslim jurists have also considered factual difference of *Dār* to be a valid ground for the dissolution of the marriage. The classical point of view has been clarified by a number of illustrations in several Hanafi books of *fiqh*¹⁴ namely *Majma'al Anhur*, *Al-Hidayah* and *Fatāwā 'Alamgiriyaḥ*. From these the following rulings may be deduced :—

- (1) A *Kitabiyah* wife of a Muslim husband takes up her domicile in a *Dār al-Ḥarb* while her Muslim husband takes up his domicile in a *Dār al-Islam*. The marriage stands automatically dissolved on the expiry of three menstrual periods, in case the *Kitabiyah* wife has no intention of migrating to the Muslim country where the husband has taken up his permanent abode.
- (2) A Muslim settled in *Dār al-Ḥarb* marries a woman also settled in the *Dār al-Ḥarb*. She then permanently settles in the *Dār al-Islam*, whereas her husband continues to remain in *Dār al-Ḥarb* and has no intention of coming to *Dār al-Islam* and reside with her there. Her marriage, on the expiry of three menstrual periods, shall automatically stand dissolved.
- (3) A Muslim resident of a *Dār al-Islam*, say Pakistan, goes to a *Dār al-Ḥarb*, say the United States of America, and marries there a Muslim or a *Kitabiyah* and then comes back to his original country or goes and settles in some other Muslim State. His wife, however, refuses to follow him to that country and settles down in the States or any other non-Muslim country

¹⁴Dāmād Afandī : *Majma' al-Anhur*, vol. i, p. 371; Al-Marghinānī : *Al-Hidayah*, Qur'an Mahal, Karachi, vol. ii, p. 347; *Fatawa 'Alamgiriyaḥ*, Dewband, vol. ii, p. 39, (*Kitāb al-Nikāḥ*).

with no intention to go to a *Dār al-Islam*. The marriage shall, on the expiry of three menstrual periods, stand dissolved automatically.

- (4) If the *Kitabiyah* wife of a Muslim comes from a *Dār al-Ḥarb* and settles down in *Dār al-Islam* but her husband is settled down in *Dār al-Ḥarb* with no intention to change his *Dār* (domicil), the marriage shall, then, on expiry of three menstrual periods stand dissolved automatically.
- (5) Difference of *Dār* may also embrace a situation where a *Kitabiyah* wife of a Muslim husband resident of *Dār al-Ḥarb* comes to Pakistan or for that matter goes to any other *Dār al-Islam*, adopts Islam and settles there, and her Muslim husband continues to reside permanently in *Dār al-Ḥarb* and has no intention of coming to *Dār al-Islam*. In such a case the marriage shall also stand dissolved.

Author's View :

In view of the present day international relations and immigration facilities, the marriage should not be allowed to stand dissolved *automatically* on account of the actual difference of domicil, but the power of dissolving it should vest in a court of law. Such a court may grant a decree on application moved by the aggrieved party. The view of the author is also supported by the fact that the dissolution of Muslim Marriages Act, 1939, makes it necessary to obtain a decree of dissolution of marriage from the court on any ground which is regarded as valid for the dissolution of marriage under Muslim Law. This also includes dissolution of marriage on account of difference of *Dār* (domicil) between the spouses. Mawlānā Syed Abul A'la Maudoodi has expressed the same view in answer to a query put to him as envisaged in the correspondence between him and late Mawlānā Zafar Ahmad 'Uthmani.¹⁵

The law on the subject has been re-stated and codified by the present writer in the section above.

¹⁵Abul A'la Maudoodi : *Rasā'il wa Masā'il*, Lahore, 1967, vol. ii, pp. 150-184 at pp. 151, 167 and 183.

CHAPTER XXII

'Iddat (Period of Probation)

Section 159. *'Iddat* is that fixed period during which it is incumbent upon the wife, whose marriage whether valid or irregular, has been dissolved either by a divorce after consummation or by the death of her husband, to remain in seclusion and to abstain from marrying another husband.

COMMENTARY

'Iddat in Islamic *Shari'ah* is that fixed period which it is incumbent upon a divorced or widowed wife to pass before contracting another marriage, provided that the husband had cohabited or had had valid retirement with his wife. Consequently, for the woman who has been cohabited with even after a plausibly marriage contracted in doubt (نکاح بالشبهة) the rule of observance of the *'iddat* shall be binding on her too.

Section 160. *'Iddat* shall be incumbent upon the wife in the following cases :

1. Divorce or separation effected after consummation or valid retirement in pursuance of a valid marriage contract.

2. Divorce or separation effected after consummation or valid retirement in pursuance of an irregular marriage contract.

3. Husband's death after valid or irregular marriage contract, even if before consummation of marriage.

Explanation : In case of divorce or separation before consummation, observance of *'Iddat* shall not be incumbent upon the wife.

COMMENTARY

'Iddat is incumbent under God's bidding. God in the Holy Qur'an says :—

- (i) "Divorced women shall wait concerning themselves for three periods" (II : 228).¹
- (ii) "If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days; when they have fulfilled their term, there is no blame on you, if they dispose of themselves in a just and reasonable manner" (II : 234).²
- (iii) "Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubt, is three months and for those who have no courses (it is the same" (LXV : 4).³
- (iv) "For those who carry (life within their wombs), their period is until they deliver their burdens". (LXV : 4).⁴
- (v) "Nor resolve on the tie of marriage till the term prescribed is fulfilled". (II : 235).⁵

If a woman believing in a revealed Book be in the marriage of a Muslim, for her too the same rules of 'Iddat shall be applicable as are applicable to a Muslim woman.⁶

Section 161. The *Iddat* shall start from the time of separation
The start of Iddat or pronouncing of divorce or the death of the husband.

¹Al-Qur'ān, Surah Al-Baqarah, (ii : 228) :

”والمطلقات يتربصن بأنفسهن ثلاثة قروء“ -

²Ibid, (ii : 234) :

”والذين يتوفون منكم ويذرون أزواجاً يتربصن بأنفسهن أربعة أشهر وعشراً فإذا بلغن أجلهن فلا جناح عليكم فيما فعلن في أنفسهن بالمعروف“ -

³Al-Qur'ān, Surah Al-Talāq, (lxv : 4):

”ولا تئى يئسن من المحيض من نساء كم ان ارتبتم فعد تهن ثلاثة اشهر ولا تئى لم يحضن“

⁴Ibid:

”واولات الاحمال اجلهن ان يضعن حملهن“

⁵Al-Qur'ān, Surah Al-Baqarah, (ii : 235)

”ولا تعزبوا عقدة النكاح حتى يبلغ الالكتب اجله“

⁶Fatawa al-Alamgiriyyah, Majidi Press, Kanpur, Chapter on *Iddat*.

COMMENTARY

The 'Iddat as a mandate of *Shari'ah*, under the biddings of God, commences from the time the divorce is pronounced, or separation is effected or the husband dies.

If a woman does not get knowledge of her divorce or death of her husband and the period of 'iddat passes away she shall be considered to have completed the period of the observance of her 'iddat.⁷ In other words, it shall be considered to have started from the time of the divorce pronounced, or from the time of the occurrence of death, not from the time it comes to the knowledge of the woman.

If the husband effects divorce to his wife but retracts, and the wife institutes a suit in a court of law and leads evidence, and the court holds that the husband had effected the divorce, the period of 'iddat shall be considered to have started from the time of the divorce effected, not from the time of the order passed.⁸ If the period of 'iddat passes away during court's proceedings, its observance shall be considered to have been completed.

Pakistan Law and 'Iddat :

To say that as section 7 of Family Laws Ordinance holds, divorce pronounced shall not be effective till ninety days from the date of the receipt of its notice by the chairman, creates doubts and misgivings in the compliance of the provisions respecting 'iddat. It is, therefore, necessary that the effects of sections 7 & 8 of the Muslim Family Laws Ordinance, 1961 be examined in the light of *Shari'ah* and appropriate amendments be made therein. (See pp. 164-66, 458-64 *supra*).

Section 162. (1) The 'Iddat of an adult divorced woman who
Computation of 'Iddat. is subject to menses shall be three such periods.

Explanation : If the husband divorces his wife in the state of her being in menses the observance of 'Iddat for full three such periods shall be incumbent upon her and the period during with which the divorce was effected shall not be included in the three periods.

⁷Al-Marghinani, Burhan al-Din : Al-Hidayah, Qur'ān Mahal, Karachi, vol. ii, p. 422-23.

⁸Fatāwa Alamgiriyyah, op. cit. vol. ii, Chap. of 'Iddat,

(2) A divorced woman who does not menstruate because of her tender age old age, disease or because of some other cause shall count her *'iddat* as three months.

Explanation : If a woman has regular periods at the time of divorce or separation but they finally cease during her *'iddat*, it shall be of three months' duration to be counted from the time the menses stop.

(3) A woman whose husband dies, her *'iddat* shall be of four months and ten days.

Explanation : If the husband effects a revocable divorce and dies during the *'iddat* period, the observance of *'iddat* for death shall be incumbent upon the woman, i.e., the *'iddat* period shall be of four months and ten days duration from the date of death.

(4) For a pregnant woman the period of her *'iddat* extends in any case till the time of the delivery from pregnancy.

Explanation : If there is no sign of pregnancy at the time of divorce, separation or death of the husband but any sign does appear during the period of observance of *'iddat*, the *'iddat* shall continue till the time of the delivery from pregnancy.

COMMENTARY

Menstruating Women :

If the husband pronounces revocable or irrevocable divorce to his wife, or separation between them is effected in some manner other than divorce, and the woman is in her menses, for her the appointed period of *'iddat* is three of her menses, as God says, "Divorced women shall wait concerning themselves for three months" (II : 228). Hence until this prescribed period is over, the woman's marriage with another person is forbidden.

The word "Quru" — Interpretations:

There is a difference of opinion on the meaning of the word, *Quru'* (قروء). According to Hanafis it means "menses", whereas according to

Al-Shafi'i it means '*tuhr*' (period of purity). Hence, according to the latter, the *iddat* period is not the passing of three periods of "menses" but that of the three periods of "*tuhr*" (purity).

The Hanafis argue that God has qualified the word *Qurū*, with the word *thalāthah* i.e. three. The three shall mean complete three neither less nor more. Thus, if a person pronounces divorce in the state of purity (*tuhr*) (as is commanded according to Shafi'i) some part of the time of purity must elapse. If this '*tuhr*' (purity) is counted towards the '*iddat*' it shall be somewhat less than the three *tuhrs*. If this be not counted towards the '*iddat*' the '*iddat*' shall be somewhat more than three *tuhrs*. Therefore, it becomes difficult to act on the bidding of Qur'ān by taking the meaning of *Qurū* as *tuhr* (purity). But Imām Shafi'i argues that God has mentioned the word *thalāthah* (three) before the word *Qurū*. The word *thalāthah* is in feminine gender and is discriminatory according to rules of syntax which discriminate it from the word, *Qurū*. It is a fundamental rule that when the discriminator is in the feminine gender the discriminated from must be in the masculine gender. *Qurū* is thus in the masculine gender and it shall be taken to mean '*tuhr*' (purity) as *tuhr* is in the masculine gender whereas *hayḍ* (menses) is in the feminine gender. Hence taking the word *Qurū* as meaning *hayḍ* contravenes the rules of syntax.

The Hanafis, however, argue in reply that here *Qurū* after *thalāthah* shall be taken as a numeral according to the plain word and not according to its syntactical meaning.

Analysis :

There is no doubt that the word *Qurū* carries two meanings. That is to say, it means both *hayḍ* and *tuhr*. It is, however, a fundamental rule that if a word has two meanings and both be opposite to each other it shall then be given only one meaning at one time. According to Hanafis there is another argument for taking '*qurū*' to mean as '*hayḍ*'. They say, the purpose of '*iddat*' is to ensure cleanliness of the womb and "*hayḍ*" determines the purification of the womb. Besides, according to the saying of the Prophet and according to the consensus of opinions of jurists the '*iddat*' for a slave girl is the period of two menses.⁹ If this tradition of the Prophet is read in conjunction with the word '*quru*' the meaning of the word "*qurū*" shall herein be determined as menses, for then it will be strengthened with a presumption as well. "*Quru*" therefore shall, in the context, be taken to mean "*hayḍ*" (menses) and not "*tuhr*" (purity).

Non-menstruating woman :

For the women who do not have the discharge, the period of 'iddat is three months' as God has appointed three months of 'iddat with respect to those women who are despaired of menses.

Pregnant woman:

The 'iddat of a pregnant woman is till the pregnancy is over, as God has said "For those who carry (life within their womb) their period is until they deliver their burdens" (LXV : 4). Hence for a pregnant woman, undergoing 'iddat, no particular period of 'iddat is fixed. If the child is delivered a few hours after divorce the 'iddat shall come to an end at that very moment.¹⁰ Allama Shi'rāni has, in his book, *Al-Mizān al-Kubrā*, said that the jurists are agreed on the point that 'iddat for a pregnant woman is the delivery of her child though she may be either a divorcee or a widow.¹¹

If signs of pregnancy appear in a woman whose discharge of menses has totally discontinued and she has undergone a part of 'iddat on a monthly count, her 'iddat shall then be co-terminus with the delivery of her child.¹²

Modern Legislation :

The Legislatures of some of the Muslim countries have incorporated laws of 'iddat in their *Qanūn al-Aḥwāl al-Shakhsiyyah*. For example, the Iraqi law is as under :

Art. 47. 'Iddat is binding on the wife in the following circumstances :

- (a) When separation between the spouses takes place after consummation of marriage, whether by a revocable divorce or by an irrevocable one (allowing or not allowing remarriage directly), or by mutual consent or by dissolution or under the option of puberty ;
- (b) When the husband dies, even if before consummation of marriage.

¹⁰Fatawa Qaḍi Khan, *Kitab al-Talaq*, Chap. on *Iddat*; Al-Marghinani : *Al-Hidayah*, Karachi, vol. ii, p. 422-30.

¹¹Al-Shi'rāni, Abdul Wahab: *Al-Mizan al-Kubra*, Egypt, vol. ii, p. 135:
 "اتفق الأئمة على أن العدة الحاصل مطلقاً بالوضع سواء المتوفى عنها زوجها أو المطلقة"

¹²Fatawa Alamgiri, Kanpur, Chapter on *Iddat*; *Fatāwā Qaḍī Khan*, Chap. on 'Iddat.

Art. 48. (1) 'Iddat of divorce or dissolution of marriage is, in case the marriage has been consummated, three menstrual courses.

(2) If the woman has attained puberty but is not having menstruation, the period of 'iddat for her is three months.

(3) The 'iddat of death is four months and ten days, if the woman is not pregnant; and if she is pregnant she shall wait for the said period or till delivery, whichever period is longer.

(4) Where the husband of a divorced woman dies during the period of her 'iddat she shall observe the 'iddat of death, and the past period shall not be counted.

Art. 49. 'Iddat begins immediately after divorce, dissolution of marriage or death, as the case may be, even if the woman is not aware of the cause.

Art. 50. The maintenance of 'iddat for a divorced wife is obligatory on the living husband, even if she is not obedient; but there is no maintenance during 'iddat of death.

Pakistan Law—Suggestion :

Under the provisions of section 7 of Pakistan's Family Laws Ordinance VIII of 1961, concerning 'iddat of a pregnant woman it has been laid down that if the wife be pregnant at the time the *ṭalōq* is pronounced, the *ṭalōq* shall not be effective until the period mentioned in sub-section 3 (i. e. three months) or the pregnancy (whichever be later) ends. It is reported from some of the Companions of the Prophet, with respect to 'Iddat of a pregnant widow, that its duration shall be of four months and ten days or till the pregnancy ends (whichever be later). The same thing is stated from 'Ali. Probably, our Legislators drawing inspiration from the same source, have, in effect, laid down that 'iddat for a pregnant divorced woman shall be for the period of three months or till the pregnancy ends (whichever is latter). But according to the four Sunni Imams unanimously, 'iddat for one pregnant divorcee or widow, is the end of pregnancy only. 'Abdullah Ibn Mas'ūd has categorically held that the *Sura Al-Talaq* in which the 'iddat for a pregnant woman is held to be till the end of pregnancy, has been revealed later to the *Sura Al-Baqara*. Hence, it is mandatory to act upon the provisions of the *Sura Al-Talaq*. It is stated in a tradition that one Sabi'ah was pregnant

at the time of her husband's death. She gave birth to a child after forty days. Thereafter, the Prophet, (peace be on him), allowed her to enter into a contract of marriage. The Caliph 'Umar also ruled that the 'iddat of a pregnant woman ends with the delivery of the child, even though the dead body of her husband is still to be buried.

In view of the proved traditions, consensus of opinions of jurists, the continuous practice of the 'Ummah, and that the *Sura Al-Talaq* was revealed later than the *Sura Al-Baqra*, where the 'iddat of a pregnant woman is laid down till her delivery from pregnancy, it is incumbent for us to act upon it. Hence, the 'iddat for a pregnant woman whether she be divorced or widowed is till her delivery from her pregnancy. This is also supported by the Qur'anic verse (LXV : 6), wherein the divorced or widowed pregnant women have been ordered to be paid maintenance till their delivery from pregnancy. It can be safely argued that as their 'iddat ends after delivery from pregnancy so does the liability for payment of maintenance to them. It shall be appropriate if in the light of these objections section 7 of the Muslim Family Laws Ordinance, 1961 be properly amended.

CHAPTER—XXIII

Law of Parentage and Legitimacy

Section 163. Parentage is the legal relationship of the parents with children created by their birth in consequence of a legal marriage contract entered into between the parents.

COMMENTARY

The relationship of children to their parents because of their birth is called parentage. The legitimacy of parentage depends upon the matrimonial relationship of the husband and wife being in accord with the Islamic law. The parentage of a child is considered as established even in doubtful cases. For instance, in case of doubt in the act (*Shubha fil fi'l*) or in case of doubt in the marriage contract (*Shubha fil'aqd*) though the marital relationship shall be held to be *fāsid* the children born of the said wedlock shall be held to be legitimate.¹

Establishment of Parentage.

The establishment of parentage is based on the Prophet's saying "the issue belongs to the bed and for the adulterer there is the stoning".² It is thus meant that a legal marriage contract must be in existence at the time of conception of the child. Islamic law leans favourably towards holding the children to be of legitimate parentage so that they may be recognised as legitimate children and no confusion or immorality may spread in the society. On this basis the irregular (*fāsid*) marriage contracts and co-habitation in doubt (*waṭī bil shubha*) are also considered as good grounds for the proof of parentage.³ Islam even in such cases does grant full citizenship status and does not penalise the child for what is no fault of his—a most rational approach.

¹Tanzilur Rahman : *Majmu'a Quwanīn Islām*, Karachi 1965, vol. i, pp. 147-51; Also see pp. ..., *supra*.

²"الولد للفراش و للعاهر الحجر"

³Tanzilur Rahman : *Majmu'a Qawanīn Islām*, Karachi 1965, vol. i, pp. 147-51.

Establishment of paternity:

Paternity is established when the child is legitimate. A child to be legitimate must be the offspring of a man and his wife. If the marriage between the parents is valid or irregular, the children would be legitimate. Thus, where a man has married a fifth wife during the subsistence of his marriage with four other women, irrespective of the fact whether the marriage with the fifth wife in the presence of four is treated as *fāsid* (invalid) or *bāṭil* (void), it is agreed that the children born of such marriage are deemed to be legitimate [PLD 1968 Lahore, 587 (DB)]. Even when the marriage of the parents is void, but the parties believe in good faith that there is no impediment to their marriage, the marriage is, so far as they are concerned, valid and legal for all purposes. If at a later stage it is found that there was such an impediment, the marriage is no doubt null and void but children born of such a marriage are legitimate [PLD 1963 Lahore, 141 (F. B.)].

Proof of marriage :

The existence or subsistence of a marriage is a question of fact. Direct proof of that fact may be available, but if it is not, indirect proof may suffice. One of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a child (PLD 1975 S.C. 624) or by continued cohabitation with the mother of the child coupled with treatment tantamount to acknowledgment. (AIR 1931 Lah. 223=134 I. C. 590.)

But mere continued cohabitation for a long period in the absence of proof of marriage is not sufficient to prove marriage, particularly when the woman was a prostitute before the alleged marriage. (*Iftikhar Nazir Ahmad vs. Ghulam Kibria*, P. L. D. 1968 Lah. 587; *Ghazanfar Ali Khan vs. Kaniz Fatima*, I. L. R. 23 All. 345 P. C.) It was stated in a case that evidence of intimacy and very close intimacy alone cannot establish a marriage between the parties. There are cases where marriage was presumed from prolonged and continued cohabitation. But in this case the duration of cohabitation is only for a period less than a year. Presumption of there being a valid marriage was not drawn under the circumstances. (*Dr. A. L. M. Abdullah vs. Rokeya Khatoon*, P. L. D. 1969, Dacca-47).

When the connection between a man and a woman was unlawful in its inception it is very difficult to infer subsequent marriage from the fact of mere exclusive cohabitation for a long time. (*Ghazanfar Ali Khan vs. Kaniz Fatima*, I. L. R. 23 All. 345.

The marriage of a Muslim with a non-Muslim (non-Kitabiyah) woman who is not the lawful wife of another is merely *fāsid* and so the children

born of such a marriage are legitimate. (*Zakir Ali vs. Soghra Bi*, A. I. R. 1918, Nag. 32; 43 I. C. 833; Also see p. 34 *supra*).

Presumption of marriage :

When it is proved that a man and woman lived together for a long time as man and wife there is a strong presumption in favour of marriage having taken place between them. (*Bashir-un-Nissa vs. Bunyad Ali* 50 I. C. 677; *Abdul Aziz vs. Ameer Begum* 66 I. C. 404). This rule holds good with still greater force when the alleged marriage took place so long back that it is difficult to obtain trustworthy account of what really occurred and when the conduct of the parties is shown to be compatible with the existence of the relationship of husband and wife. (*Iftikhar Nazir Ahmad Khan vs. Ghulam Kibria*, P. L. D. 1968 Lah. 587; *Aga Mohammad Jaffer Bindanim vs. Koolsoom Bibi*, I. L. R. 21 Cal. 666.)

The Privy Council in *Mahomed Baukher v. Shurfoon Nisa* (8 MIA 136, 159) said: "The legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation." A statement by a deceased father that he was married to the mother is evidence of marriage from which the legitimacy of the child may be presumed. (*Zamin Ali V. Aziz-un-nissa* (1933) 55 all. 139, 144 I. C. 433.

Section 164. Parentage is of two kinds :—

Kinds of Parentage

- (1) Paternal Lineage. (2) Maternal Lineage.

COMMENTARY

Parentage is established on the basis of the matrimonial alliance between the husband and wife both, though the matrimonial alliance may have been created either by valid (*ṣaḥīḥ*) marriage contract or by irregular (*fāsid*) marriage contract. Indeed, the maternal relationship of the child is established in the woman who gives birth to the child irrespective of the fact whether the woman's conjugal connection with the man was lawful or not. In other words, for the establishment of the maternal relationship of a child it is immaterial whether the birth is the result of a valid marriage contract between the man and the woman or is the fruit of their fornication.

Children's maternal lineage, in all events, is established and proved with the woman who in fact gives birth to them. But paternal lineage is

not established unless the children are born as a result of a valid or irregular marriage contract entered into between their parents. That is to say, if a person commits adultery with a woman and she gets pregnant and a child is born to her the child shall be held to belong to her alone, for the establishment of all legal rights and responsibilities. It shall not be held to be the child of the adulterer under the Islamic law.

Under Muslim law the man who is responsible for conception *after marriage* with the child's mother is considered to be the father of the child. In other words, the man is to be proved to be the husband of the child's mother at the time of its conception.

There is a difference between legitimacy and legitimation. The former is a status which *results* from certain circumstances while the latter is a proceeding which *creates* a status which did not exist before. (AIR 1922 P. C. 159; PLD 1975 S. C. 624).

Section 165. Parentage gives rise to certain rights and obligations as regards guardianship of person and property, maintenance, will and inheritance.

Effects of Parentage.

COMMENTARY

Children's legitimacy becomes established no sooner than their parentage is proved. The parents and the children, then, become subject to all the rights and obligations that are recognized by Shari'ah concerning them. The children, therefore, become entitled to maintenance; and the parents to the guardianship of the person and property of their children. On the death of one or the other the survivor becomes entitled to inherit from the property of the deceased. If the children's paternity, however, is not proved they are considered to be the children of their mother. In such event the children are entitled to inherit only from their mother and from their maternal relatives. The mother and the maternal relatives in turn are held to be successors to the property of these children. (For details on the point of inheritance see Volume II Chapter on "Inheritance of illegitimate Children").

Modern Legislation :

In connection with the consequences of the establishment of the parentage of children, section 133 (2) of the Syrian "*Qanūn al-aḥwāl al-shakhsiyya*" states: "when parentage is proved, the marriage contract, be it an irregular one or be it a result of cohabitation-in-doubt, (*watī bil shubha*) shall subject the woman to all effects and consequences of that relationship. The marriage contract with all persons within the prohibited

degrees due to that relationship shall be forbidden to her and she shall be entitled to maintenance and inheritance."

Likewise it is stated under section 72 of "*Mujallatul-ahwal al-shakhshiyya*" of Tunisia : "The absence of proof of the child's paternity with his father excludes him from the category of agnates and his right to maintenance and inheritance (from the father) lapses".

Section 166. (1) For the validity of paternity the minimum duration of pregnancy after a legal marriage contract, shall be of six months and the maximum period of pregnancy shall be of two years, except where it be proved that the spouses during the period had no access to each other so that pregnancy could have taken place.

(2) In the event of wife's observing period of probation of divorce or death the two year's maximum period of pregnancy shall be counted from the death or divorce only where the wife has made no affirmation of the expiry of the term of probation earlier excepting that the husband or his heirs claim the said child born even after two years of death or divorce.

(3) In the event of the affirmation by the wife of expiry of her term of probation the maximum period of pregnancy shall be of 180 days from the time of affirmation and two years from the time of her separation from or death of her husband, where no such affirmation is made.

Explanation : For fixation of the period lunar month and the year shall be taken into account.

COMMENTARY

There is a difference of opinion on the question as to what is the longest period of pregnancy under the Islamic law. But there is complete unanimity amongst all the jurists with respect to the shortest period of pregnancy.

Shortest period of pregnancy :

In proof of the shortest period of pregnancy the two Qur'anic verses⁴ are cited. It is proved from these two verses that the total period of pregnancy and child's weaning is of thirty months and the period of child's weaning by woman is of two years. In other words, the suckling period for the child is of twenty four months and the rest of six months are indicated as the shortest period of pregnancy.

Longest period of pregnancy :

There is, however, difference of opinion amongst the Imams (Jurists) on the question as to what is the longest period of pregnancy. According to the *Hanafīs*, in general, the longest period of pregnancy is of two years. According to the well known dicta of Imams Malik, Shaf'i and Ahmad Ibn Hanbal the longest period of pregnancy is of four years. One ruling of Imam Ahmad Ibn Hanbal, however, is also in accord with that of *Hanafī* rule of conduct (practice). However, the period of pregnancy at best according to Laith b. Sa'd is of three years, according to 'Ubbād bin Awwām five years and according to two different reports from Imam Ibn Shihāb Zuhri, five years and seven years. That is to say, for this long the child may well remain in womb during a valid state of pregnancy.⁵

Hanafi Point of View :

The *Hanafīs* cite the tradition of 'Ā'ishah in support of their argument that "the child does not remain a moment longer than two years in the womb of its mother".⁶ The literal meaning of ظل مغزل is "spindle's shadow. By this, in fact, metaphorically is meant "the smallness of time". *Hanafīs* say that the said opinion of 'Ā'ishah could only be based on her hearing it from the holy Prophet. It is not possible to accept it as her own personal view, in as much as in legislative matters such personal views would not be

⁴ Al-Qur'ān, Sura, *Al-Aḥqāf*, xlvi : 15,

”وَحَمْلُهُ وَفَصَالُهُ ثَلَاثُونَ شَهْرًا“

Al-Qur'ān, Sura *Luqmān*, xxx : 14,

”وَفَصَالُهُ فِي عَامَيْنِ“

⁵ Ibn Humām : *Fatḥ al-Qadīr*, Cairo, (1356 A.H.), vol. iii, p. 310;

Ibn Qudama Al-Maqdisi : *Al-Mughnī*, Cairo, (1367 A.H.), vol. vii, p. 477;

⁶ Ibn Humām : *Fatḥ al-Qadīr*, Cairo, (1356 A.H.), vol. iii, p. 310.

”الولد لا يبقى في بطن امه اكثر من سنتين ولو بظل مغزل“

Ibn Qudama Al-Maqdisi : *Al-Mughnī*, Cairo, (1367 A.H.), vol. vii, p. 474.

allowed to interfere. In the law-making the assertions of a Ṣiḥābī or Ṣiḥābiya are always considered to be based (unless otherwise indicated) on hearing them from the Prophet (peace be on him).⁷

Rule of conduct of the three Imams :

In support of their opinions, Mālik, Al-Shāfi'i and Aḥmad Ibn Ḥanbal cite a few incidents by way of argument. Thus it is reported from Walīd b. Muslim that he, Walīd, said; "I mentioned before Imām Mālik the tradition narrated by Jamīla Bint S'ad as stated from 'Ā'ishah that no woman can remain pregnant for more than two years." Imam Mālik said, "Good God; who can say this ? The wife of Muhammad b. 'Ajlān, in my neighbourhood, remained pregnant for four years". This event has been reported by Al-Shāfi'i as well. Ahmad b. Ḥanbal too has said about Banu 'Ajlān that the woman of Banu 'Ajlān have ordinarily remained pregnant for four years and the wife of 'Ajlān gave birth to three children and each child remained in the womb for four years. Similarly Muhammad b. 'Abd Allah b. Hasan b. 'Alī remained in the womb of her mother for four years. Abul Khattāb too has narrated the same about Ibrahim b. Najī'al-Uqaili. Similar are reports from the Caliph 'Uthmān and 'Ali. Thus according to Imams Mālik, Al-Shāfi'i and Ahmad Ibn Ḥanbal the longest period of pregnancy is of four years.⁸

Hanafi rejoinder :

In answer to such reports the Hanafis support the tradition narrated by 'Ā'ishah and maintain that her words shall be considered to be the words of the Law-giver himself (peace be on him). There is hardly any possibility of error creeping into it. Hence the said tradition should be accepted in preference to the quoted incidents. Moreover the statement of Imam Malik regarding the incident or incidents, even if accepted as correct, cannot be held as conclusive proof of the fact that the longest period of pregnancy is of four years.⁹ At best such incidents may be said to be rare and exceptional on which no legal mandate of the Shari'ah can finally and conclusively be based.

In our opinion too the tradition from 'Ā'ishah may be reasonably accepted as the basis of good law. God says, "Have we not created you

⁷Al-Kasānī : *Bada'i' al-Ṣana'i'*, Cairo, (1328 A.H.), vol. iii, p. 211.

⁸Ibn Qudama Al-Maqdisi : *Al-Mughni*, Cairo, (1367 A.H.), vol. vii, pp. 477-78.

⁹Ibn Humām : *Fatḥ al-Qadīr*, Cairo, (1356 A.H.), vol. iii, p. 310; Damād Afandī : *Majma' al-Anhur*, Cairo, (1327 A.H.), vol. i, p. 474.

from a fluid (held) despicable? The which We placed in a place of rest firmly fixed, for a period (of gestation) determined (according to need)".

This Qur'ānic verse is silent about the period a child shall stay in mother's womb. But according to all the jurists it is an accepted rule that a Qur'ānic verse concise in statement may get further elaboration from a tradition of the Prophet, reported from a single chain of narrators. However if the mandate in the Qur'ān be absolute, according to the Hanafis, a single narrative from the Prophet cannot be accepted as the source of its authentic explanation or elaboration. But other Imams, however, hold that in such a *nass* as well single narrative from the Prophet may well form good source of its explanation and elaboration.

The aforementioned assertion of Ā'ishah, though of the classification of a single narrative, can be relied upon as good explanation of the concise dictum in the Qur'ānic verse referred to above. This narrative though *mawqūf* (not directly related from the Prophet) is accepted as *marfu'* (related of the Prophet). According to the principles of *fiqh* quantum in the matters of Shari'ah cannot be fixed by conjectures. They rather rest on divine communication. Therefore, Ā'ishah merely on her conjecture and personal opinion could not have interpreted the Qur'ānic phrase, *إلى قدر معلوم* as maximum two years, unless she had heard of it from the Prophet himself. Consequently on the basis of the said tradition narrated by Ā'ishah rests the verdict of the Hanafi jurists that the longest period of pregnancy is of two years, and not more.

Shi'a Point of View :

According to Shi'a jurists the shortest period of pregnancy is six months and the longest period is nine months; according to others it is ten months. According to still others the period may be of one year. But Najmuddin Abu Ja'far al-Hilli has in his famous work, "Shra'i' al-Islam" characterised the assertion regarding the period of one year as obsolete.¹¹

Modern Legislation :

In the laws concerning the period of pregnancy that are in force in Muslim countries the period is fixed, with minimum of six months and the maximum at one year. Following are extracts from the current laws of different Muslim countries :—

¹⁰ Al-Qur'ān, Sura, *Al-Mursalāt*, lxxvii : 20-12;

”الم نخلقكم من ماء مهين-فجعلناه في قرار مكين-إلى قدر معلوم“

¹¹ Al-Hilli Najm al-Din : *Shara'i' al-Islām*, Tehran, (1377 A.H.), p. 199.

Egypt :

Section 15. The claim of parentage of the child by the wife in case of its denial by the husband shall not be entertained when the union between the spouses from the time of their marriage contract is not established or when the wife gives birth to the child after one year of her husband's disappearance or when the wife who has been divorced or whose husband is dead, gives birth to her child after one year of her getting divorced by him or of his death.¹²

Iraq :

Section 51. The child of every wife shall be attributed to her husband with the following two conditions:—

1. That after the marriage contract between the couple a period of six months of pregnancy, at the least, must have expired.
2. That the spouses had access to each other.

Section 69. The parentage of the child shall not be established in the event of the denial by the husband when union between the couple is not proved. Nor the parentage of the child shall be established when the wife gives birth after one year of her husband's disappearance or of his death or pronouncement of divorce by him.¹³

Tunisia :

Section 71. When the wife at the expiry of six months or thereafter of her marriage contract gives birth to a child its parentage shall be established from her husband whether her marriage contract is valid or irregular.¹⁴

Syria :

Section 128. The period of pregnancy at the least is 180 days and at the most one solar year.¹⁵

Pakistan :

According to Section 112 of the Pakistan Evidence Act, 1872 the law concerning conclusive presumption of legitimacy is as under:—

¹²*Qanūn al-Miṣrī*, No. 25 of 1929.

¹³*Qanūn al-Aḥwāl al-Shakhsiyya*, 1959, Iraq.

¹⁴*Majalla al-Aḥwāl al-Shakhsiyya*, Tunisia.

¹⁵*Qanūn al-Aḥwāl al-Shakhsiyya*, Syria.

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten”.

The Shari‘at and Section 112 of Evidence Act, 1872 :

The question arises whether the Islamic law of the legitimacy is hit by Section 112 of the Evidence Act. The Allahabad High Court in the Case of *‘Sibt Muhammad vs. Muhammad* (1926 Allahabad, 589) has held that by Section 112 of the Evidence Act, 1872 the Islamic law regarding legitimacy stands repealed. The Lahore High Court too has held the same view in the case of *Mst. Rahim Bibi vs. Chiragh Din* (AIR Lahore 1930, page 97).

There is a conflict between the rules as to legitimacy under Muslim Law and under Section 112 of the Evidence Act, 1872. The rules regarding legitimacy in Muslim Law are summarised as under :—

- (a) A child born within six months of the marriage is illegitimate, unless the father claims it to be legitimate.
- (b) A child born after six months of the marriage is legitimate unless the father disclaims it by *li‘an*.
- (c) A child born after the termination of the marriage is legitimate if born within 2 lunar years according to Hanafi School, within 4 lunar years according to Maliki, Shafi‘i and Hanbali schools, and within 10 lunar months according to Shi‘ah law”.

After a comparison of Section 112 of the Evidence Act with Islamic provision of law on the point of “legitimacy” it is quite clear that the said section contradicts and is repugnant to the Islamic law. This would appear from the following examples :—

1. Unlike the rule enacted by Section 112 of the Evidence Act, a child born within six months of marriage is, under Islamic law, presumed to be illegitimate. At the same time one born within two years after dissolution by death or divorce is presumed to be legitimate. A child born to a woman within six months of her marriage is, in the absence of the evidence of non-access, deemed to be legitimate under Section 112 of the Evidence Act, though according to Islamic law such child would be illegitimate.

2. Again, under Islamic law a child born within two lunar years of the dissolution of a marriage is presumed to be legitimate. Whereas under the Evidence Act there is neither any presumption in favour of legitimacy nor any counter presumption when the child is born more than 280 day but less than 2 years after the dissolution of marriage, and consequently the burden of proving legitimacy in those circumstances would be on the person who alleges it. However, the presumption as to paternity being a rule of evidence, the presumption under the Islamic law yields to the presumption enacted by the Act, which it should not as "Islam governs and is not governed," *الاسلام يعلموا ولا يعلى*.
3. Further, the presumption of legitimacy created by Section 112 of the Evidence Act is not applicable to the issue of an irregular (*fāsid*) marriage though the presumption of Islamic law is certainly so applicable.

Though in some cases the court may presume under Section 112 the existence of such events the occurrence of which, in the opinion of the court, be possible, yet the *natural course* of the occurrence of such events was kept in view. Therefore, in a Calcutta case, (*Ashraf Ali vs. Asad Ali*. 1871 C. W. N. p. 2) prior to the enactment of the Evidence Act the court refused to take cognizance of this rule of legitimacy of the Islamic law concerning a child born nineteen months after the date of pronouncement of divorce, on the ground that to hold such a child (who was born 19 months after the date of the pronouncement of divorce) as legitimate is against natural course and is an impossibility.¹⁶

The present writer is firmly of the view that Section 112 of the Evidence Act so far as it relates to the legitimacy of a child born within six months of or even immediately after, the marriage of its parents (unless it is established that they could have no access to each other) raises a presumption directly in contradiction to the Qur'ānic injunction according to which such a child is illegitimate. In case of dissolution of marriage, however, Section 112 states that a child's birth within two hundred and eighty days after such dissolution, mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man. Under Muslim Law time limit after marriage is extended to two lunar years in the case of Hanafi school and four years in the case of Shafi'i and Maliki schools. This provision is neither in accord with the accepted view of the Sunni schools of law nor the present legislative enactments of different Muslim countries, where the period, in such case is fixed at one year. There is, however, no inconsistency in

¹⁶ *Ashraf Ali v. Asad Ali*, 1871, C.W.N., p. 260.

the Act and the Muslim law in case of a child born after six months of the marriage and during its continuance.

Effect of repeal of Section 2 (i) of the Evidence Act :

“The question about the applicability, of Section 112 of the Evidence Act again arose after the repeal of Section 2 of the Evidence Act.

Section 2 as it originally stood in the Evidence Act, 1872 read as under :—

“2. On and from that day the following laws shall be repealed :—

- (1) all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India ;
- (2) all such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861, in so far as they relate to any matter herein provided for ; and
- (3) the enactments mentioned in the schedule hereto to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed”.

The first clause of the above Section repealed all Rules of Evidence which were not contained in any Statute, Act or Regulation. Hence, all rules of evidence which had their origin in the Islamic law which, with some modification, were followed by the courts in India before coming into force of the Evidence Act, ceased to have any force of law and as such the view of Indian High Court had been that the Muslim law of Evidence was not applicable.

In 1938, Section 2 as referred to above was repealed. Yet in the case of *Capt. T. W. Wing vs. Mrs. F. E. King* (AIR 1945 Allahabad, 190) it was observed that the repeal of Section 2 of the Evidence Act by the Amending and Repealing Act of 1938 did not make any difference because it did not have the effect of re-enacting the rules which the said section had earlier repealed. This point also came up before the High Court of West Pakistan. A Division Bench of the High Court of West Pakistan in the case of *Abdul Ghani vs. Taleh Bibi* (PLD 1962 Lahore, page 531) held that the rule of the Muhammadan Law of Evidence repealed by clause (i) of Section 2 were revived by repeal of the section itself. The learned Judges were thus of the

view that after the repeal of Section 2 of the Evidence Act, the rule of evidence of Muslim Law as to legitimacy had been revived.

This judgement of the Lahore High Court was approved by the Supreme Court of Pakistan in the case of *Hamida Begum vs. Murad Begum* (PLD 1975 S. C. 624 at p. 650) and it was held that "on the repeal of Section 2 of the Evidence Act by Act I of 1938, the rules of Muslim Personal Law stood revived, and would apply in matters of legitimacy etc., where the parties are Muslims."

Regarding the controversy whether the rule of legitimacy is a rule of evidence or forms part of the substantive law, the Supreme Court in the aforesaid judgement observed that "the rule enunciated by the Punjab Chief Court as early as 1884 in the case of *Rahmat Ali vs. Mst. Allahdi* (I. P. R. 1884) and since followed in large number of cases was indeed correct, namely, that for the purposes of Section 2 (i) of the Evidence Act the rules of Muslim law on the question of legitimacy must be treated as rules of evidence, and accordingly repealed by it, with the consequence that the matter would be governed by section 112 of the Evidence Act even in those cases where the parties were Muslims."

Much can be said against this view that the rules of Muslim law on legitimacy are rules of evidence. As supported by all the classical Muslim jurists the Muslim Law of legitimacy is an integral part of the Muslim Personal Law and as such ought to have been applied in cases regarding legitimacy where the parties were Muslims. The Evidence Act introduced a principle which is based on the English doctrine of legitimacy by holding the *time of birth* of the child as the main factor determining legitimacy; whereas Islam holds, inter alia, the *time of conception* to be the basic factor for determining legitimacy.

In a case of Nagpur Judicial Commissioner's Court it was held that the provisions of Muslim law of legitimacy being part of the substantive law of Muhammadans, the rule laid down in Section 112 is not applicable to them (*Zakir Ali vs. Sughra Bai*. AIR 1938 Nag 32; 43 I. C. 883).

The matter also came up for decision before the Allahabad High Court in several cases. In *Sibt Muhammad vs. Muhammad Hameed* (ILR 48 All. 625) the Court held at the very outset that under Section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, questions regarding marriage or inheritance are to be decided according to the Muhammadan Law where the parties are Muhammadans "except so far as such law has by legislative enactment, been altered or abolished." The Court then said: "Sir Roland Wilson in his treatise on Anglo-Muhammadan Law expressed the opinion

that Section 112 of the Indian Evidence Act is really, notwithstanding its place in the statute book, a rule of substantive marriage law rather than of evidence, and as such has no application to Muhammadans in so far as it conflicts with the Muhammadan rule that a child born within six months after the marriage of its parents is not legitimate."

Syed Ameer Ali, a well-known authority on Muslim law, too, held the view that "Section 112 of the Evidence Act embodies the English rule of law and cannot be held to vary or supersede by implication the rule of Mohammadan Law." (Ameer Ali: Mohammadan Law, Lahore, VIth Ed. 1965, p. 179). With utmost respect to our Supreme Court, this humble writer is of the firm view that the question of legitimacy is closely and directly inter-linked with marriage and succession. Also, upon a careful analysis of the cases which bear upon the legitimacy of a child, it will be found that the matter in dispute invariably turns either upon the validity of the marriage of the parents or on the proof of the fact that the child was conceived and born in wedlock. Furthermore, there seems to be no valid reason as to why the rules of pregnancy and legitimacy be not governed by the substantive Muslim law particularly when the doctrine of acknowledgement which is also a part of the Muslim law of legitimacy has been so held by the courts of Indo-Pak sub-continent.

However, to avoid any future controversy on the subject it is advisable if a proviso to Section 112 of the Evidence Act 1872 be added to the effect that the provisions of this section shall not be made applicable where the parties or the father of the child is a Muslim.

Medical View :

Several physicians, in the light of their experience, have expressed their views about the period of pregnancy. Accordingly, Shaykh Bū 'Ali Sina, (Avicenna) in his book, "Al-Qanūn Fil Tib"¹⁷ writes that a child is generally born within a period of 9 months. The shortest period for the birth is of 7 months and its longest period is of 10 months. Evidently, the Shaykh has laid down the normal period of pregnancy from merely medical point of view. But how long the period of abnormal pregnancy may last is not commented upon in his aforesaid book.

Dr. F. Hollick, the author of "*Origin of Life and Process of Reproduction*" (page 354) quoting Socrates, Aristotle, Galen and the Shaykh Bū 'Ali Sina (Avicenna) writes that according to all of them the period of child's birth generally is of 9 months but sometime it may extend to 10, 11, 12 or 15 months also.

¹⁷Cairo ed., vol. ii, p. 570.

From the medical point of view a child's birth generally takes place in ten lunar months. Thus, the period of pregnancy is of 266 days. In case of pregnancy by a single sexual exposure (intercourse) the period has been calculated to be of 269 days. Yet, according to western authors the maximum period of a child's birth, from the records which exists, may be of 389 days,¹⁸ 313 days,¹⁹ 11 months²⁰ and 330 days to 342 days.²¹

Dr. Arif Sidqi of Syria writes in his book "Al-Tib al-Shar'i" (page 122) that in this matter no period can be fixed with any certainty. The principle, however, is that it depends upon the menstrual cycle of each woman. Generally the period of a child's birth consists of ten such periods i.e. in all 280 days.

Conclusion :

Though from the medical point of view the birth of a child in two years is rare but the *Imams* and jurists are agreed on the point that in matters of the Shari'ah verdicts on purely medical basis are not valid. That is to say the science of medicine alone cannot be held to form the basis of a religious decree. Islam in its fundamental moral concepts even accepts the weakest evidence in holding a child as legitimate for several valid reasons. That is why the Islamic law holds the birth of child during irregular marriage, or cohabitation in doubt to be proof of legitimacy.

The saying of the Prophet, "The issue belongs to the bed and for adulterer there is the stoning" (21-A) lays the foundation with regard to the proof of lineage. Jurists of the *Ummah*, therefore, in thrashing out the details of the matter have given their full support to the view that the child be held, as far as possible, to be legitimate. With this background if the question of the longest period of pregnancy is looked into, one would feel that the jurists have kept in view the rare cases as well. According to this writer, therefore, it is advisable that the tradition narrated by 'Aishah noted above should be made the basis for the decision of questions regarding the period of pregnancy. The consequence of the fixing of the maximum period of pregnancy to two years will be that merely the birth of a child

¹⁸Ralph C. Benson (Hand-book of Obst. and Gyn., 1964), pp. 47-52.

¹⁹Medical Examiner, June 1964 with ref. of Origin of Life and Process of Reproduction, p. 354-55.

²⁰Medical Gazette with ref. of Origin of Life and Process of Reproduction, p. 355.

²¹Legal Medicine by Maj. Collis (1902), p. 330-35.

^{21a} "الولد للفراش وللعاهر الحجر"

to a woman in more than a year's time (which may extend to two years) may not by itself render it as illegitimate.

But alongwith the same it is an admitted fact that the cases of a child's birth in two years are rare. Hence to check the risk of an illegitimate child taking the place of a legitimate child the period of one year as the longest for pregnancy has been enacted in several Muslim countries. This is based merely on observation and on day to day experience gained from the happenings of events. But there in the matter of legitimacy the prudence which the classical Muslim jurists have generally exhibited has thus been unnecessarily disregarded, without any exception.

Section 167. Subject to the provisions of the preceding Proof of Parentage. Section, child born of a known and reputed married relationship (whether valid or irregular) having been, without any doubt, established between a man and woman shall be legitimate.

COMMENTARY

There are two usual categories of proof of parentage. One is conclusive and the other presumptive:—

- (1) If a man marries a woman and a child is born in less than six months the child shall not belong to that man under Muslim law, because impregnation must have taken place before his marriage contract and not induced by him in as much as the period of the birth of a child is never of less than six months. If the child is born at or after the completion of six months it must be the issue of that man because the incident of the woman being in bed with him during the existence of marriage contract is established there from and the period of pregnancy is also complete.²²
- (2) If a woman who has been divorced by her husband, gives birth to a child *within a period of two years* of the divorce and during the said period she does not admit of the expiry of the period of her probation, the child's paternity under the law shall be that of the husband who has pronounced the divorce. If the said woman on expiry of three months of observing the period of her probation on divorce admits the

²²Al-Nasafī, 'Abd Allah : *Kanz al-Daqā'iq*, Muhtabai Press, Delhi, (1338 A.H.), p. 150.

Al-Quduri Abul Hasan : *Al-Mukhtasar*, Cairo, p. 172.

completion of the period of her probation and then the child is born the child's paternity shall not be established from that of the husband who pronounced the divorce except when the husband claims that the child belongs to him.²³ *Indeed if the child is born in less than six months of such admission*, the paternity shall get established because the birth of the child in less than six months after admission is the proof of the fact that child's pregnancy had taken place before the expiry of the period of probation.²⁴

- (3) The paternity of a child of such a woman who has been divorced irrevocably shall get established with the husband if the child is born within two years, because in such an event it may be presumed that the pregnancy might have taken place before the pronouncement of divorce.²⁵ If the child is born after the completion of two years of the said divorce paternity shall not get established except when the husband claims the child to be his. If the child is born just at the completion of two years (i.e. not a moment later) paternity of the child shall accordingly get established.²⁶
- (4) The paternity of the child of a widow born within two years of the death of her husband shall get established from him.²⁷ If the widow at the end of four months and ten days declares the expiry of the period of her probation and then, after full six months, a child is born to her the paternity of the child shall not get established with the deceased. If, however, it is born in less than six months its paternity shall get so established.²⁸

²³Al-Nasafī : op. cit., p. 149; *Sharh al-Waqāya*, Deoband, vol. ii, p. 159.

Al-Marghīnānī, Burhan al Din : Al-Hidāya, Delhi, vol. ii, p. 430.

²⁴Ibn al-Humām, Kamal al-Dīn : *Fath al-Qadīr*, Cairo, (1356 A.H.), vol. iii, pp. 300-301.

Damād Āffandī : *Majma' al-Anhur*, Cairo, (1327 A.H.), vol. i, p. 474.

²⁵Al-Qudūrī : op. cit., Cairo, (1330 A.H.), p. 171.

²⁶Al-Marghinani : op. cit., vol. ii, p. 430.

Ibn al-Humām : op. cit., vol. ii, p. 303.

Sharh Waqaya, Deoband, vol. ii, pp. 156-57.

²⁷Al-Marghīnānī : op. cit., vol. ii, p. 431.

²⁸Ibid.

Ibn al-Humām : op. cit., Cairo, (1356 A.H.), vol. iii, p. 303;

Al-Nasafī : op. cit., p. 149;

Al-Qudūrī : op. cit., p. 172.

If a woman, subject to menstruation, while observing her period of probation admits its termination, and a child is born to her even after six months or more upto four years of such termination, then, according to Imāms Mālik and Shāfi'i, paternity of the child shall be established with the divorcing or dead husband as the case may be unless she has contracted another marriage. But according to Imam Ahmad bin Hanbal, in such a case paternity of the child shall not be established with the divorcing or dead husband. (But some of the Hanbali jurists such as Kharqī and others, agree with Imām Mālik and Shāfi'i in this particular situation). Thus it is said in a well known book on Hanbali *fiqh*, *Al-Mughni*, that if a woman subject to menstruation, or a woman who is observing the term of probation on the death of her husband even after her admission of the expiry of her term of probation, gives birth to a child within a period of less than four years of such admission the paternity of that child shall get established; and on the basis of this birth the admission of the expiry of her term of probation shall be deemed to be a lie²⁹ unless of course she re-married.

- (5) According to Hanifis, if a woman's husband dies the paternity of the child born to her at any time during the period of two years after his death, shall be established with the deceased husband.³⁰ But according to Imām Zufar, on the other hand, if the child is born in less than six months after the lapse of the period of observance of probation after death (four months and ten days) its paternity shall be so established otherwise not.

If the widow was not major, rather she was approaching the age of majority and the child is born to her in less than ten months and ten days its paternity with the father shall be established and if it is born thereafter, paternity with him shall not be established, because the period of probation on one's death is four months and ten days and the period of pregnancy is, at the least, six months. Hence if the child is born within the total of these two periods i.e. ten months and ten days it shall be the proof of the fact that pregnancy had taken place during the life-time of her husband.³¹

- (6) If a child is born to a woman in less than six months after the date of her marriage contract paternity of the child shall not be established with her husband because, in this case, incidence of pregnancy before the marriage contract is evident. On the

²⁹Al-Maqdisī, Ibn Qudāma : *Al-Mughni*, Cairo, (1367 A.H.), vol. vii, p. 479.

³⁰Al-Qudurī : op., cit. p. 172.

³¹Damād Affandī : op. cit., vol. i, p. 477.

other hand, if the child is born after full six months or more, paternity shall be proved whether the husband acknowledges it or not or remains silent. If a husband denies that the child is born to his wife but the midwife bears testimony to the fact of the child being born to her, the paternity of the child with the husband shall get established but the husband shall be subject to the provisions of the law of *li'an* because of the repudiation of paternity.³²

Modern Legislation—Syrian Law :

With respect to parentage the following law is in force in Syria :—

Section 129. (1). The paternity of the child of every woman who is validly married shall be established with her husband *subject to the following two conditions* :—

- (a) The period of six months, at the least, of the (state of) pregnancy from the date of the marriage contract of the couple, must have expired.
- (b) The non-access of the one to the other (of the couple) must not have been established: for instance, (if) any one of the couple be in prison or be at a far off place till the maximum period of pregnancy expires.

(2) If any of the two above-mentioned conditions is not found the paternity of the child shall not be established with the husband except when the husband acknowledges and claims the child to be his.

(3). When the above-mentioned *two conditions* are fulfilled the parentage of the child from the husband cannot be denied except by *li'an* or imprecation.

Section 130. If a divorced or widowed woman does not admit of the expiry of her term of probation, her child's paternity shall be established with her husband provided the said woman has given birth to the child within one year from the date of divorce by or death of her husband. If she has given birth to the child after more than a year the paternity of the child shall not be established with that husband except when her husband (in case of divorce) or his heirs (in case of the death of husband) claim the child.

³²Ibn al-Humām : op. cit., vol. iii, p. 308.

Damād Affandī : op. cit., vol. i, p. 477.

Section 131. The paternity of the child of a divorced or widowed woman who admits of the expiry of her term of probation shall get established when she gives birth to the child in less than one hundred eighty (180) days from the time of such admission or in less than a year from the date of divorce or from the date of the death of her husband.

Section 132. (1) The paternity of the child who is born in consequence of intercourse in irregular marriage contract shall be established with the husband provided the child is born in one hundred and eighty (180) days or more after the date of intercourse.

(2) If that child is born after desertion or separation (from the husband) its paternity shall not be established except when the woman gives birth to the child within one year of the date of desertion or separation.

Section 133. (1) In case of cohabitation in doubt if the woman gives birth to a child within the time between the shortest and the longest period of pregnancy, the paternity of the child shall be established with the person who has co-habited with the woman.³³

Section 168. The existence of marriage relationship between
 Parentage by a man and a woman in accordance with Islamic
 claim Shari'ah and the validity of parentage of the
 children born of them may be established by claim.

COMMENTARY

"Claim" is the second kind/category of evidence for establishment of parentage. If a man makes a claim about a boy that he is his own son, and thereafter the man dies and the mother of the boy then claims that she is the wife of the deceased, the woman shall be considered to be the wife of the deceased and the boy shall be recognised as his son,³⁴ provided that the claim by the man that the boy is his son is not an impossibility. For instance, there might be such difference between the ages of the man and the boy that it be impossible to conceive that the boy is the son of that man, e.g. the man is of twenty-five and the boy of twenty years of age.

³³*Qanūn al-Aḥwāl al-Shakhsiyya*, Syria.

³⁴Ibn al-Humām : op. cit., vol. iii, p. 309;

Al-Nasafī : op. cit., p. 154;

Sharh al-Waqaya, op. cit., vol. ii, p. 167.

If a man divorces his wife and she gives birth to a child after two years or more and the husband claims that it is his child, the paternity of that child shall be established with that man.³⁵

If a child is born to the wife in less than six months after the marriage the paternity of the child shall not be established with the husband unless he so claims it and does not aver that the child is the off-spring of adultery.

Similar shall be the verdict when an adulterer marries the woman with whom he has committed adultery. If she was pregnant by that man and the child is born in less than six months after their marriage contract the paternity of the child shall not be established with him unless the man claims it as his child and does not aver that the child is the result of adultery.

Section 169. The parentage of a child can be as validly presumed from those facts from which the marriage contract of the parents is validly presumed.

Parentage by
evidence and
assumption

(a) During the continuance of a married relationship between a man and a woman if a child is born of them wherein there is a doubt in the observance of the principles of Islamic Shari'ah the parentage of such a child can be proved by evidence.

(b) All evidence conformable to Shari'ah shall be accepted for the establishment of parentage.

COMMENTARY

For the proof of parentage the third means is relevant evidence. It is said in the "Hidayah" that the Prophet, (peace be upon him) has said, "The evidence of women is valid in those matters which are not performed in the sight of men". Although there is some difference about the exact words of this tradition but it is narrated by Ibn Abi Shaybah from Shihāb al-Zuhri maintaining that Zuhri has said, "The tradition is to the effect that evidence of women is valid in matters of which nobody except women get informed". The tradition has been reported by Dār Qutni through Hudhayfah that, "the Prophet has held the evidence of midwife to be valid". Hence if the husband denies the birth of the child during the existence of his marriage contract, the birth of the child shall be established by the sole-evidence of the midwife.

³⁵Ibn al-Humām : op. cit., vol. iii, p. 303;

Damād Affandi : opp. cit., vol. i, p. 376.

Imam Muhammad al-Shaybāni as well has reported in his book, "al-Āthār" that Ibrahim Nakh'ī too considered the evidence of women valid on the matter of the crying of a child at birth.

But there is a difference of opinion between Imām Abū Hanifah and the *Ṣāhibayn* about the paternity of the child born of a divorced woman in the event of its repudiation by the man. It is argued by Imām Abū Yūsuf and Imām Muḥammad that a divorced woman, who gives birth to a child during the term of her probation, is considered during such continuance to be in bed of her husband. Her so being in bed establishes the paternity of the child. Hence there is no need of independent proof of paternity. However in the event of repudiation by the husband it is only necessary to prove that child was born of that woman and this shall be proved from the evidence of one woman, the midwife. This evidence will prove paternity with as much certainty as birth during a valid marriage of the parents.

Imam Abu Hanifah on the other hand argues that the terms of probation of a divorced woman shall expire as soon as she admits the birth of the child and what has lapsed cannot be valid evidence. It shall, therefore, be necessary to prove the parentage anew and to prove the paternity by full independent evidence (that is of two males or of one male and two females) shall be duly required. In other words, with the child's birth and the lapse of the term of probation, the woman shall be treated as a stranger to the man and to prove paternity due evidence ought to be led, which shall constitute of two men or one man and two women. To put it in another way, if a child is born to a woman during her term of probation but the husband denies paternity, then, according to Imam Abu Hanifah, it shall stand proved with her husband by the evidence of two men or of two women and a man. But according to Imam Abu Yusuf, however, the parentage may be proved by the evidence of a midwife only. Indeed, if the pregnancy be apparent or the husband acknowledges the pregnancy the parentage shall undoubtedly stand proved.³⁶

If the husband denies the birth of the child, paternity shall be established by the testimony of the midwife. It is written in *Sharh Al-Waqāyah* that in case a woman undergoing her term of probation claims that she has given birth to the child and the husband denies its birth then, according to Imam Abu Hanifah, if the pregnancy before birth was not apparent nor had the husband accepted pregnancy, the testimony of two men or of one man and two women would be necessary for the establishment of parternity.

³⁶Al-Qudūrī : op. cit., p. 172;

Al-Marghinānī : op. cit., vol. ii, p. 431.

According to *Ṣāhibayn*, however, the testimony of one woman, the midwife would be enough.³⁷

According to Imam *Sahfī* and Imam Malik the testimony of two women is essential. There is unanimity among the Hanafī 'Ulama' on the point that during the continuance of marriage contract paternity shall be established by the testimony of the midwife. The difference of opinion among them is in the event of marriage contract not being in existence due to the death of the husband or divorce effected to the wife. Thus, according to Imam Abu Hanifah alone, in the event of the death or the divorce the testimony of the midwife shall not establish paternity. Whereas according to *Ṣāhibayn* it shall be so established by the testimony of the midwife.

Gist of the Arguments :

The gist of the above arguments is that the paternity of a child, born of a woman during her term of probation whether due to the death of her husband or due to revocable divorce or irrevocable divorce, in the event of its denial by the husband, shall be established when two men or one man and two women testify the birth of the child from the woman, or her pregnancy be apparent from before or her husband admits of her pregnancy. This is the verdict of Imam Abu Hanifah.

In all these situations, however, according to *Ṣāhibayn*, the paternity of the child shall be established by the evidence of one woman (midwife) only, on the ground that the continuation of the term of probation, is synonymous and identical with the woman's being in bed of her husband and mere proof of birth is enough for the establishment of paternity. What is required is merely to establish or prove that the child born is of that woman for which the evidence of the midwife is sufficient.

Imam Abu Hanifah, however, argues that the woman's admission of the birth of the child legally makes her term of probation lapse and what is lapsed cannot be the basis for future course of action. Assuredly for the establishment of paternity independent proof is necessary. The evidence, therefore, should consist of the testimony of two men or of one man and two women. The situation would be different in cases there are visible signs of pregnancy or the husband admits that pregnancy, then as the proof of parentage already exists and what is required is the proof of the fact that the child born is of that woman, testimony of the midwife

³⁷Sharh al-Waqāya, op. cit., vol. ii, p. 160;

Al-Marghīnānī : op. cit., vol. ii, p. 431.

should be conclusive evidence. If a child born of a woman observing her term of probation due to the death of her husband is testified as such by the heirs of the deceased and there be no other evidence existing, all the *A'immah* are agreed that the child's paternity shall be established as against the heirs. But there is a difference of opinion whether the parentage of the child shall be deemed to be established or not as against the strangers as well. According to some jurists if the heirs of the deceased are qualified to testify it, the paternity of the child shall then be established as against all other persons. In such a case, according to some jurists, the condition is that the heirs of the deceased must have acknowledged the paternity of the child with the word of *Shahādat*, but according to some other jurists, the use of the words, *Shahādat* is not particularly necessary for the purpose and this view has been accepted to be correct.³⁸

In case a difference arises between the husband and the wife on the birth of child from her. The husband asserts that only four months have passed after her marriage with him, whereas the wife maintains that she was married six months ago. In such an event (and in the absence of any other evidence) the statement of the wife shall be given credence, because *prima facie* evidence is in favour of the wife. That is to say, the birth of the child ought to be assumed to have taken place during the existence of the marriage contract, not that it is the result of adultery.³⁹

Suppose a child is born to a woman, irrevocably divorced or widowed, in less than two years of such divorce or death of the husband, and the woman does not admit the expiry of her term of probation, then if the husband or in case of his death the heirs deny the paternity of child, the paternity of the child with the husband shall be established if the signs of pregnancy were apparent at the time of death or divorce or if two men or a man and two women bear witness of the birth.⁴⁰

Section 170. When the paternity of a child is unknown its parentage shall be established through acknowledgement (in accordance with the Shari'ah) provided that such acknowledgement shall not affect persons other than the mother, father and the child unless so confirmed by others.

Parentage
through
acknowledgement

³⁸Ibn al-Humām : op. cit., vol. iii, pp. 306-7.

Dāmād Affandī : op. cit.

³⁹Ibn al-Humām : op. cit., vol. iii, pp. 306-7.

⁴⁰Al-Nasafī : op. cit., pp. 149-50.

COMMENTARY

Legitimacy is a status which results from certain facts, whereas legitimation is a proceeding which creates a status which did not exist before. This process becomes necessary where either the existence of a valid marriage cannot be expressly proved or where the child is born within six months of the marriage. (AIR 1922 P. C. 159; PLD 1975 S. C. 624).

When the paternity of a child is not established in due course with its father, that is to say, if it is not proved that at the time of its being conceived there existed a valid married relationship between its parents, the parentage may be established, under Islamic law, through 'acknowledgement of parentage'. If the paternity of the child with another person stands established the said acknowledgement shall become ineffective. In other words, the principle of "acknowledgement of parentage" shall apply only when the parentage is unsettled and unknown.

Conditions :

The basic principles of the "acknowledgement of parentage" are that the legitimacy be legally, practically and normally possible; for instance, the person should be of an age that he may be the father of that child, the woman should not be related to him in prohibited degree and the child must not be well known as the issue of some other person.

It is not necessary that the acknowledgement of paternity be specifically made. If a person habitually and openly treats a child as his legitimate issue his legitimacy may, from this fact, be presumed.

It may be pointed out here that the principle of the "acknowledgement of paternity" is not merely a mode of evidence, rather it is the part of the substantive law of *Shari'ah*. Hence the courts ought to act in accordance with the law of *Shari'ah*, while dealing with the acknowledgement of parentage.

Child born to eunuch : If a husband of a woman is a eunuch (*majbub*) and she gives birth to a child, the child shall belong to him when he acknowledges it to be his child or does not disclaim it. (Ibn 'Abidin: op. cit., Vol. II, p. 610). This rule seems to be based on the principle that an acknowledgement or the absence of a disclaimer obviates any investigation about his physical condition. (Muhammad Allahdad Khan Vs. Muhammad Ismail Khan I. L. R. 10 All. 289 at pp. 333, 336). If the marriage is dissolved after valid retirement and a child is born to her then according to Imām Abū Yūsuf the child belongs to him if born within six months of the dissolution of the marriage. According to Imām Abu Hanifah the

child shall belong to him if born within two years of the separation. This is subject to the condition that in both the cases he should claim the child to be his. (Ibn 'Abidin: op. cit. Vol. II, p. 610).

Modern Legislation :

There has been some recent legislation in Muslim countries with respect to acknowledgement of parentage, as detailed below:

Iraq :

Section 52. (1) Acknowledgement of a child of unknown parentage as a son, though it be made by a person in death-illness, shall be the proof of parentage of that child when with such acknowledgement there be the possibility of a son, like the one acknowledged, being born to the acknowledger.

(2) When the person acknowledging be a married or a divorced woman the paternity of her child shall not be established with her husband without the husband's corroboration or evidence.

(3) Acknowledging some one as father or mother, by a person of unknown parentage, shall establish that unknown person's parentage with the acknowledged one, provided the acknowledged one corroborates it and an issue like the acknowledged one may be normally born to that acknowledger.

(4) Acknowledgement of parentage, besides the son, the father and the mother, shall not be effective as against the non-acknowledger, unless that other person (one affected) so corroborates it.⁴¹

Syria :

Section 134. (1) The paternity of a person of unknown parentage gets established with his acknowledger though he be in death illness, when there is such a difference in age that the relationship of father and son be a possibility between them.

(2) When the acknowledger be a married woman or a divorced one the parentage of the child does not get established except by the combined testimony (of the husband and wife) or by evidence.

Section 135. If a person of unknown parentage acknowledges that a certain person is his father or mother, his parentage shall get established with that man or woman when the acknowledged one corroborates it and

⁴¹*Qanūn al-Aḥwāl al-Ṣakhsiyya, Iraq.*

that there is such a difference in the age between them that the existence of such relationship is possible.

Section 136. Acknowledging a person as son, father or mother by one shall have no effect on a person not acknowledging it except when he corroborates it.⁴²

Rulings :

The Privy Council in the case of "*Mohammad Azmat vs. Lali Begum*" remarking that in several cases it has been decided that express acknowledgement of parentage is not necessary, has laid down that the acknowledgement by a Muslim of the parentage of his issues can be spelled out by his open fatherly treatment.⁴³

The Privy Council in the case of "*Habib-ur-Rahman Vs. Altaf Ali*" discussing in detail the "acknowledgement of parentage" has said, "As marriages among Mohammadans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of legitimate sonship. Further, it must not be impossible upon the face of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgement has more than a mere evidentiary value....It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a non-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgement the onus is on him to prove a marriage. Once he establishes an acknowledgement, the onus is on those who deny a marriage to negative it in fact".⁴⁴

Section 171. The acknowledgement of parentage made in accordance with the dictates of the Shari'ah shall not be retractable.

Retracting from
the acknowledge-
ment of parentage

⁴²*Qanūn al-Aḥwāl al-Shakhsiyya*, Syria.

⁴³1881, Indian Appeals.

⁴⁴(1921) 48, Indian Appeals, 114, 120-21.

COMMENTARY

If a father acknowledges a child to be his and that relationship in law and fact be possible he shall then have no right to retract from it. Hence parentage once acknowledged can not be retracted.

Section 172. Adoption of a child as son shall, under the Shari'ah, be ineffective.

Adoption of a
child as son

COMMENTARY

It is a well known fact that the Prophet, (peace be on him) had adopted Zaid Bin Hāritha as his son. When Zaid divorced his wife, Zainab, the Prophet, after the completion of her term of probation, married her under God's command. The Jews began to taunt him that he had contracted marriage with the divorced wife of his "son." The Qur'ānic verse was then revealed, "Muhammad is not the father of any one of your men."⁴⁵ Zaid Bin Hāritha whom the Prophet had adopted had not become his son in fact so as to prohibit the Prophet from marrying his divorced wife. The rule that emanates from this verse is that the adoption of some one as son does not legally give him the status and rights of a son. If a person, therefore, is an adopted son he shall not have the same rights as the real son has against his parents; for instance, the right of maintenance and inheritance. Likewise, one who adopts cannot as well inherit from the property of his adopted son. Indeed a will to the extent of one-third of his estate may, however, be made in the adopted son's favour as in case of any stranger.

Some people, in modern times, are trying to legalise adoption in Islam in such manner that the rights of a real child be conferred on the adopted one as well, and in support of their view cite "*Aqd Muwakhāt*" of Prophet's time. When he migrated from Mecca to Madina the Prophet had ordered that the *Muhājirin* and *Ansār* enter into a contract of brotherhood (*Aqd Muwakhāt*) with each other. In consequence thereof, the contracting persons used to become as brothers and inherited from each other. But basing the argument on this event is invalid now inasmuch as the Qur'ānic verse⁴⁶ later revealed explained: "And those who

⁴⁵ *Al-Aḥzāb* : 40;

"مَا كَانَ مُحَمَّدٌ أَبَا أَحَدٍ مِّن رِّجَالِكُمْ"

⁴⁶ *Al-Qur'ān*, Sura, *Anfāl*, viii : 75;

"وَالَّذِينَ آمَنُوا مِن بَعْدِ وَهَاجَرُوا وَجَاهَدُوا مَعَكُمْ فَأُولَئِكَ مِنكُمْ وَأُولُو الْأَرْحَامِ
بَعْضُهُمْ أَوْلَىٰ بِبَعْضٍ فِي كِتَابِ اللَّهِ"

accept faith subsequently, and adopt exile, and fight for the faith in your company, they are of you. But kindred by blood have prior rights against each other in the book of Allah." Thus the real kindred shall be the heirs of each other and the rule of inheritance through '*Aqd Muwakhāt*' stood repealed. Some people appear to be in favour of introducing inheritance between the adopter and the adopted on the basis of a contractual relationship but a system of inheritance in Islam cannot be introduced on the basis of a contract except in case of '*Aqd Muwakhāt*' which situation under the present conditions does not exist. Indeed the one who adopts a son or daughter may make a will to the extent of one-third of his property in favour of the adopted one as he is legally entitled to do so in favour of a stranger, or to the extent of entire property if there is no heir at all. (For detail see Volume II on "Will").

CHAPTER XXIV

Law of Custody of Children (Hidanat)

Section 171. The mother is entitled to the custody of her male ^{Right to custody} child upto seven years of his age and of a female child till she attains puberty except when the Sharia't holds the mother to be disqualified to do so.

Provided that in matters of custody of minors regard shall be had of their welfare.

COMMENTARY

The literal meaning of *Hiqānat* (custody) is upbringing. In legal terminology, the upbringing of a minor child by the mother or by some one legally entitled to it is called "ḥiḍānat" (custody).

Consensus :

There is a consensus among the Companions of the Prophet on the point that in the first instance the mother is entitled to the custody of her child; and the entitlement of other relatives comes thereafter. There is, however, difference on the point that upto what age of her son or daughter is the mother entitled to the custody.

Hanafi Rule :

According to Abū Hanifah, the mother's right of custody of the child gets transferred to the father when the male child begins eating, drinking, wearing clothes and cleaning, bathing and washing all by himself. The age of reaching this state of the child has been stated by al-Khassāf to be approximately seven or eight years. Indeed, the mother has the right of custody of the daughter till she attains the age of puberty. This is also the view of Abū Yūsuf. According to Muhammad al-Shaybānī the mother has the right of custody till the daughter shows signs of awakening of sex. The later Hanafi Jurists approve of the opinion of al-Shaybānī.¹

¹Damād Affandī : *Majma' al-Anhur*, Egypt, 1327 (A. H.) Vol. I, pp. 481-82.

Al-Kasānī : *Bada'i' al-Ṣana'i'*, Egypt, 1328 (A.H.) Vol. IV, p. 42.

Ibn Humām : *Falḥ al-Qadir*, Egypt, 1356 (A.H.) Vol. VII, p. 316.

The view point of the three Imams :

According to Mālik b. Anas, the mother has the right of custody of her son till he attains his full power of speech and of her daughter till she is contracted into marriage. According to both al-Shafi'ī and Aḥmad bin Hanbal, the mother has the right of custody of her son and daughter till they are seven years of age. Thereafter the child shall be given the right of making a choice between the father and the mother. The child shall then be given in the custody of the one whom he or she, as the case may be, chooses.²

Opinion of Shi'a Jurists :

According to Shi'a jurists, the mother has the right of custody of her son till the completion of two years of his age and of her daughter till the completion of seven years of her age. When the children reach the aforesaid ages the father becomes entitled to their custody.³

No Specific mandate in the Qur'an :

There is no verse in the Qur'ān specifically on the right of the custody of the mother. However, Jurists by way of seeking Qur'ānic sanction deduce it from the verse relating to fosterage. God says, "the mothers shall give suck to their offspring for two whole years, if the father desires to complete the term."^{3a} This directive is for those who want to benefit from the complete term of fosterage. Hence from this verse the Qur'ānic sanction is more or less obvious that the right of custody of small children, in the first instance, belongs to the mother.

Prophet's Traditions :

Besides arguing from the above Qur'ānic verse regarding the mother's right of custody, the Jurists rely upon a number of incidents and traditions as under :

- (1) When the Prophet, (peace be on him) came out (among the people after the conquest of Mecca) the daughter of Hamza followed him and called out "O' uncle, O' uncle." Thereupon 'Alī

²Ibn-Qudāmah Al-Maqdisi: *Al-Mughnī*, Egypt, 1367 (A.H.) Vol. VII, pp. 614-16.

³Al-Hilli, Najmud-Din Ja'far: *Shara'i' al-Islām*, Tehran, Part III, pp. 1-2.

^{3-a.} Al-Qur'ān: II, 233.

والوالدات يرضعن اولادهن حولين كاملين لمن اراد ان يتم الرضاعة -

caught hold of her hand and told Fatima, "Take (care of) your Uncle's daughter". Consequently, the aunt took her up. A dispute arose between 'Ali, Zaid and Ja'far on this account. 'Ali said, "I have taken her up and she is the daughter of my uncle". Ja'far said, "she is the daughter of my uncle (too) and her (maternal) aunt is under my wedlock". And Zaid said, "She is the daughter of my brother". The, Prophet, (peace be on him), decided in favour of the aunt (Ja'far's wife, sister of the minor's mother) and said, "Aunt (maternal) ranks as mother".⁴

- (2) 'Amr b. Shu'aib has narrated from his father and his father has narrated from his grandfather Abdullah b. 'Amr that a woman presented herself before the Prophet of God (and said) "Here is my son for whom my belly was the vessel, my breast was the water bag and my lap was the refuge. His father has divorced me and wants to take him away from me". The Prophet said, "you have better right to your son till you do not contract another marriage".⁵
- (3) Rāfi' b. Sanān narrated a tradition to me. He said that he accepted the faith of Islam but his wife refused to accept it. She went to the presence of the Prophet and said, "My daughter's feeding by me has been stopped (by the father)". Rāfi' said, "She is my daughter". The Prophet asked Rāfi' to take his seat at one side and the woman on the other side and directed them to make the daughter sit between them. Thereafter he asked both of them to call their daughter to them; (call being made) the daughter (seemed) inclined towards her mother.

⁴Bukhari : Al-Sahīh, Egypt, Vol. III, p. 57.

Al-Bayhaqī : Al-Sunan al-Kubra, Deccan, Vol. VIII, p. 5.

"فخرج النبي صلى الله عليه وسلم فتمعه ابنة حمزة تنادي ياعم ياعم فتنا ولها على فاخذ بيدها وقال لفا طمة دو نك ابنة عمك فحملتها، فاختصم فيها على وزيد وجعفر، قال علي انا اجدتها وهي بنت عمي، وقال جعفر ابنة عمي وخالتها تجتني، وقال زيد ابنة اخي فقضى بها النبي صلى الله عليه وسلم ليخا لتها، وقال "الخالة بمنزلة الام".

⁵Al-Baihaqi : Al-Sunan, Deccan, Vol. VIII, pp. 4-5.

"عن عمرو بن شعيب عن ابيه عن جده عبدالله بن عمر ان امرأة قالت يا رسول الله ان بنى هذا كان بطنى له وعاء وثلثى له مقع وجرى له حواء وان اباه طلقني ارا دان ينزعه مني فقال لها رسول الله صلى الله عليه وسلم انت احق به ما لم تنكحي".

Thereupon, the Prophet prayed, "May God guide her (the child)". Then she got inclined towards her father. Consequently Rāfi' picked up his daughter.⁶

- (4) It is stated by Abi Maimuna that he was (sitting) with Abū Hurairah who said that a woman came to the Prophet and said, "My husband wants to take away my son, although he (my son) gives me comfort and brings me drinking water from the well of Abu 'Uyanah". Thereon, her husband appeared denying her claim over his son. The Prophet then said, "O' child! Here is your father and here is your mother, make a choice between the two whomsoever you want." The son caught hold of the hand of his mother and she went away with the son.⁷
- (5) It is stated by 'Amarat al-Jarmi that 'Ali gave him the authority (to choose) between the mother and the uncle and then he said about his (Amarah's) brother who was younger than him, "It is (proper to do) so; I shall give him the same powers when he comes up to your age".⁸
- (6) It has been stated to me by 'Abd al-Rahman b. Abi al-Zinad. He has reported it from his father who has learnt it from other jurists, (whose opinions have been based on reports from the

⁶Al-Bayhaqī : Al-Sunan al-Kubra, Deccan, Vol. III, p. 3; Abu Da'ūd : Al-Sunan, Karachi, Vol. I, p. 305.

"حدثني رافع بن ممان انه اسلم و ابت امرأته ان تسلم فأتت النبي صلى الله عليه وسلم فقالت ابنتي وهي فطيم وقال رافع ابنتي فقال النبي لرافع اقعدناحية وقال لامرأته افعدى ناحية قال واقعد الصبية بينهما ثم قال ادعواها فمالت الصبية الى امها، فقال النبي صلى الله عليه وسلم اللهم اهد لها فمالت الى ابیها فاخذها".

⁷Al-Nasa'ī : Al-Sunan, Karachi, Vol. II, p. 93; Al-Bayhaqī : Al-Sunan al-Kubra, Deccan, Vol. VIII, p. 3.

"عن ابی سیموثة قال بینا انا عند ابی هريرة فقال ان امرأة جاءت الى رسول الله صلى الله عليه وسلم فقال فداک ابی وامی ان زوجی يريد ان یذهب بابنی ونفعی وسقالنی من بئرابی عینة فجاء زوجها وقال من یخاصمنی فی ابنی یا غلام! هذا ابوک وهذا اسک فیخذ بیداهما شئت فاخذ بیدامه فانطلقت به".

⁸Al-Bayhaqī : Al-Sunan al-Kubra, Deccan, Vol. VIII, p. 4.

"عن عمارة الجرمی قال خبرنی علی رضی الله عنه بین امی وعمی ثم قال لاخ لی اصغر منی وهذا ایضاً لو قد بلغ مبلغ هذا الخیرته".

Medinites) who said that Abū Bakr gave decision against 'Umar al-Khattāb and in favour of the maternal grand mother of his son, Asim with respect to the question of his custody. At last when he, (Asim) became major and Umm'Āsim was then alive and was under the wedlock of another person.⁹

- (7) It has been reported by Qāsim b. Muhammad. He has stated that 'Umar b. al-Khattab had married a woman from the Ansār. She gave birth to a son whose name was 'Asim b. Umar. 'Umar divorced the woman. One day when 'Umar was proceeding on his horse-back towards Qubā he found his son playing in front of the mosque. He caught hold of him and placed him on the horse-back. His (Asim's) maternal grand-mother caught up (with them). A quarrel arose between the maternal grand-mother and 'Umar about (the custody of) that boy. Both of them came to Abu Bakr who was the Caliph. Umar said, "He is my son." Abu Bakr said, "O, Umar! leave this woman and the child". 'Umar said nothing in reply (raised no objection to this decision).¹⁰

- (8) It is narrated by Masrūq that 'Umar divorced Umm Asim. Asim was under the custody of his maternal grand-mother. The maternal grand-mother took the case before the Caliph Abu Bakr. Abu Bakr decided that the child would remain with his maternal grand-mother and 'Umar would have to provide for his maintenance. He maintained that the maternal grand-mother was better entitled to the custody of the child."¹¹

⁹Ibid p. 5:

"ثنا عبد الرحمن بن ابي الزناد عن ابيه عن الفقهاء الذين ينتهي الى قولهم من اهل المدينة كانوا يقولون ' قضى ابو بكر الصديق على عمر بن الخطاب رضى الله عنهما لجدة ابنه عاصم بن عمر بحضارته حتى يبلغ وام عاصم يومئذ حية متزوجة".

¹⁰Ibid:

"عن القاسم بن محمد قال : كانت عند عمر بن الخطاب رضى امراة من الانصار فولدت له عاصم بن عمر، ثم فارقتها عمر رضى فركب يوماً الى قباء فوجد ابنه يلعب بفناء المسجد فاخذ بعضده بين يديه على الدابة فادركته جدة الغلام فنازعته اياه فاقتلحتي اتيا ابو بكر الصديق رضى فقال عمر رضى ابني، فقال ابو بكر رضى خل بينها وبينه فما راجعه عمر الكلام،"

¹¹Ibid:

"عن مسروق ان عمر رضى طلق ام عاصم فكان في حجر جدته فحاضمتها الى ابو بكر رضى فقضى ان يكون الولد مع جدته وانفقة على عمر رضى وقال هي احق به".

- (9) In another narrative, it is stated that Abu Bakr decided in favour of the mother and said, I have heard the Prophet saying "Do not separate the mother from her child".¹²

The Opinion of Ibn Qudama Maqdisi :

The author of *Al-Mughni*, Ibn Qudama Maqdisi Hanbali has written "The mother, when divorced, has better rights of custody of her minor and immature children." In support thereof he has cited the above stated tradition No. 2 of 'Amru b. Sho'aib and the above-stated verdicts No. 6, 7, and 8 of Abu Bakr and has further said, "The mother is closer and more loving to children. No body else except the father can be a partner in this closeness and love. The fact is that even the father has not the love like that of the mother. Even the maternal grand mother has preference over the paternal grandmother." Ibn Qudamah Maqdisi, in connection with the preferential right of the mother has also said "Principles of custody have been introduced in view of the welfare of the children. Hence their enforcement shall not be proper in a way that shall put in jeopardy the person and faith of the children."¹³

Ibn Humam's Elucidation :

Similary Burhan al-Din Marghinani, the author of *Al-Hedayah* and Kamal al-Din Ibn Humam, the author of *Fath al-Qadir* have referred to both the narratives and explaining the underlying reason have said :

"Mothers are extremely affectionate to their children and are more capable of taking care and giving protection to their children than their fathers. The Caliph, Abu Bakr, in fact, refers to this affection in his assertion, "O' Umar ! Saliva of child's mother shall be sweeter to the child than your honey". The author of *Fath al-Qadir* thus explains "The mother is more affectionate than the father because the child, in fact, is a part of the body of the mother, so far as, the child has sometime to be separated from the mother by cutting him away with (a pair of) scissors. Women having special aptitude in the upbringing of children are more capable of their proper custody than men, father is, indeed, better suited for making money. Hence the narratives of al-Bayhaqi stated at No. 7 and 9 above have been put forward to

¹²Ibid;

"فقضى به ابو بكر رضى لاه ثم قال سمعت رسول الله على الله عليه وسلم يقول لا تولد والدة عن ولدها".

¹³Ibn Qudamah : *Al-Mughni*, op. cit. p. 613-14.

support the position. These narratives have also been quoted with reference to *Muwatṭʾā* of Malik and the *Muṣannaḥ* of Ibn Abi Shaibah.¹⁴

The Reason for Preference :

Al-Shafiʿī also, to support his view, has quoted these very traditions and has stated the reason for the preference of the mother's right in these words : "Thus when the child is indiscreet, the mother has a greater right to his upbringing in as much as this is a question of the right of the child, not the question of the degree of love, attachment and affection of the parents."¹⁵

This is obvious also from the following traditions of the Prophet (peace be on him) :

- (i) "It is stated by 'Ai'shah that an Arab villager came to the presence of the Prophet and said, "You kiss children whereas we do not do so". The Prophet said, "If God has taken away affection from your heart what can I do?"^{15a}
- (ii) It is related by 'Ai'shah, "A female beggar came to me. She asked for some alms. At that time I had nothing except a date. I gave that date to that woman. She divided it into two parts, handed them over to her two daughters (who were with her) and herself ate nothing".¹⁶

Analysis :

It is easy to gauge the love and affection that the parents have for the children from the above stated two narratives and it also becomes evident that the mothers have a preferential right in the upbringing of their children; except of course in some such situations when a strong presumption arises negating the mother's love and affection for her children. In the traditions referred to above the saying of the Prophet, "You have

¹⁴Ibn-Humam: Fath al-Qadīr, op. cit. p. 314.

¹⁵Al-Shafiʿī : Kitab al-Umm, Egypt, 1381 (A.H.) Vol. VIII, p. 235.

^{15a}Ibid:

"عن عائشة رض قالت جاء اعرابي الى النبي صلى الله عليه وسلم فقال اتقبلون الصبيان فما نتقبلهم فقال النبي صلى الله عليه وسلم او اسلك لك ان نزع الله قلبك الرحمة".

¹⁶Mishkat, Karachi, Vol. II, p. 461.

"وعنها قالت جاء تنى امرأة ومعهما ابنتان لها تسالني فلم تجد عندي غير ثمرة واحدة فاعطيتها فقسما بين ابنتيهما ولم تأكل منها الخ".

greater right to your son, till you have not contracted another marriage"^{16a} points to the fact that where the woman, after contracting another marriage, enters into matrimonial relationship with the second husband, gives birth to his children who attract her love and affection and she has to perform duties to her second husband that keeps her engaged, she shall not be able to fulfil the obligation of bringing up the children from her first husband. (This question shall be elaborately discussed further on). Similarly the jurists consider her right of custody as lapsed in the event of the mother being profligate or leading an unprotected life (Ghair Mamūnah).

Conclusion :

From all these traditions of the Prophet and his Companions we come to the conclusion that in the exercise of 'custody rights' regard shall be had to the welfare and protection of the child. Whatever the situation demands, shall not be lost sight of. As far as possible the mother, if there is no disqualification, shall have a preferential right. Sometimes it may so happen that, inspite of the mother and father being fit, it shall be more proper to give the right of election to the child himself. It may also happen that, in spite of the mother and father being alive, the custody of the child may better be given to other relatives on the mother's side, such as maternal grandmother or maternal uncle of the child. If the situation be such that the custody of the mother shall be harmful to the temporal or spiritual welfare of the child, the Judge himself shall have to make a better choice for the child. Similarly where no person having a primary or secondary right of custody of the children is available that right shall vest in the Judge himself. The Judge may select one from among the relatives of the child, with a female link in relationship, who may preferably be within prohibited degrees of the child. Accordingly Muhammad b. Hasan al-Shaybani has said, "If there be a cousin and also a maternal uncle of the child, the maternal uncle shall get priority because the cousin is not a relative within the prohibited degrees whereas a maternal uncle is a relative within the prohibited degrees (maḥram) and his relationship reaches the child through his mother."¹⁷

Modern Legislation :

The relevant law on *hiḍānat* has been enacted in *Qōnūn al Aḥwāl al-Shakhsīyah* in several Muslim countries, as given below :

^{16a}.

”انت احق به مالم تنكحى“-

¹⁷ Al-Kasānī: op. cit. Vol. iii, p. 43.

Iraq :

Section 57. (a) The mother, during wedlock and (even) after her judicial separation, has more than any one else the right of custody and upbringing of her children.

(b) The conditions of custody are that the mother should be mature, wise, possessed of capability of upbringing and protecting children and should not be married to a person who is stranger (*ghair mahram*) to those in custody.

(c) When the husband and wife differ in the fixation of the remuneration and period of custody, the *Qāḍī* (court) shall decide it keeping in view the interest of the minor.

(d) It is incumbent upon the father and the guardian to take due care of the upbringing and education of the child even under other's custody till he attains his seven years of age. The child, however, shall not stay with anyone else except the woman having custody until the *Qāḍī* passes an order to the contrary.

(e) A Qadi is entitled to give permission for the continuance of the custody of the child with the person who has it when it becomes apparent to him that the interests of the child so demand.

Egypt :

Section 20. A Qāḍī is competent to permit a woman for the continuance of her custody, in case of a boy after seven years till the age of nine years, and in case of a girl after nine years till the age of eleven years, when their interests so demand.

Tunisia :

Section 60. It is incumbent upon the father as well as other guardians that they take due care of the one under their custody and send him for studies to an educational institution.

Section 61. When the woman having custody goes on a travel, the guardian shall not be liable to pay her travel expenses.

Section 62. As long as the mother's custody continues and the interest of the minor under her custody is not in conflict with her own interests, the father shall be forbidden to take the child out of the city where the mother resides except when the mother consents to it.

Section 63. If a woman without any physical disability transfers her 'custody rights', without the consent of the guardian (*wali*), to some one

else, such transfer shall not be valid. The woman, however, can forego her right of custody.

Section 64. It is permissible for the person entitled to the right of custody to surrender such right. The right shall then get transferred to the person who comes next to him in degree as mentioned in Section 57. But if the person named in Section 57 refuses to accept the custody or any other person entitled to the right of custody be not present he shall then not be entitled to surrender his right of custody.

Section 65. The woman having custody will not be entitled to any remuneration for custody except compensation for the services rendered to the child e.g. cooking food for the child and rendering other services to him according to usage.

Section 66. If the child lives either with his father or his mother, it shall not be forbidden for the other to meet him. The one who wishes to take the child for a visit shall do so at his own risk and cost.

Section 67. It is a fixed rule that minor before attaining majority shall remain in the custody of the female guardian in case of a boy to seven years and in case of a girl to nine years of age. Thereafter, if the father wishes to obtain custody it shall be so ordered unless the court finds anything which makes it necessary for the continuation of the custody of the child with the woman.

Jordan :

Section 123. When a minor boy completes seven years of his age his custody period with his mother shall end. In case of a girl, (it shall be over) when she completes nine years of her age. It shall, however, be lawful for a Qadi to permit a woman, in case of a boy, to keep him in custody from seven years to nine years of his age and in case of a girl from nine years to eleven years of her age when it becomes apparent to the Qadi that their interest so demands.

Syria :

Section 142. The liability of the payment of remuneration for the custody is that of the person who is responsible for the maintenance of the minor. The remuneration shall not be more than half of the maintenance charges of the minor.

Section 143. The mother shall not be entitled to the remuneration for custody during the continuance of her wedlock or the term of her probation in case of divorce.

Section 144. When the person responsible for the maintenance of the child is, because of his poverty, unable to make payment of the remuneration for custody and some relative within prohibited degrees of the minor child voluntarily takes over the responsibility of his maintenance, the woman having custody shall have the right of either keeping the child without remuneration with her or making over the child to the person thus voluntarily offering to maintain the child.

Section 145. When the wife is disobedient and the child is of more than five years of age, it shall be valid for a Qadi to decide about the child as to whom should he be made over. The Qadi shall however have due regard for the welfare of the minor.

Section 147. A Qadi is entitled to permit a woman to keep in custody a boy till the completion of the nine years of his age and a girl till the completion of eleven years of her age.

Section 148. (a) It is not valid for a mother, during the continuance of her marriage with the father (of the child), to go on travels alongwith her child except with the permission of the father.

(b) A woman in case of divorce is entitled to go on travel to the city where her marriage was solemnized after the expiration of her term of probation, without the permission of her child's father.

Section 149. If the custodian is a woman other than the mother, she is not entitled to go on a travel with the child without the permission of the child's guardian (*wali*).

Section 150. The father, during the period of his custody of the child is not entitled to go on travel with his child without the permission of the woman.

Pakistani law :

In Pakistan the matters relating to the custody of minors, their persons and properties are regulated by the Guardians and Wards Act, 1925. In the case of *Mst. Zebu Vs. Mizaj Gul* reported in *PLD 1952, Peshawar 77*, it was held that it will be putting a ridiculous construction on section 25 of the Act to hold that after a Muslim father becomes entitled to the custody of the children, who were until then lawfully in the custody of their mother, has no remedy open to him under the Guardians and Wards Act. After the attainment of the specified age, the custody of the minor by the mother immediately becomes unauthorised. The minors would then be presumed to be in the constructive custody of the father, and if the mother refuses to hand over the children to the father it would be tantamount to

her removing the wards from the custody of their rightful guardian. It was thus held that "Section 25 of the Act, should receive a liberal construction and must be held to include the right of a father to get the custody of his minor children. A father is perfectly competent under Section 25 of the Guardians and Wards Act to get the custody of his minor children from the mother, when she ceases to be their lawful guardian". The learned judge further observed :

"Normally, when a certain person has been given the guardianship of a minor by the Personal Law, which governs him, it should be presumed that it would be for the welfare of the minors that the person has their custody in preference to everybody else in the world, including the mother. It will be for the party contending against this normal presumption to prove affirmatively and positively that it would be against the interest of the minors to return them to the custody of their natural guardian."

Child in custody of female relations, the court may restore child to custody of her father : If a woman who has the *ḥizānat* of a child denies the father of the child, who is under Muslim Law his or her natural guardian access to the child, she must be considered not only to have removed the child from the constructive custody of the father but also to have done something which is against the welfare of the minor. That the *hāzina* deprives the minor child of an opportunity to meet his or her father, means that she is doing something injurious to the mental and emotional well-being of the child. And if to this unreasonable attitude of the *hāzina* is added the circumstance that she is an old woman with no independent means who can support herself and the minor children only on a paltry pension of her husband, the *hāzina* must be deemed as not being quite fit to retain the custody of the child. In the circumstances, such as mentioned above, if the father, the natural guardian of the minor who has a better financial position and has no discreditable character, applies for the restoration of the actual custody of the children to him, he must succeed in his application. [PLD 1967 Lah. 382=19 DLR (W.P.) 43.]

Custody of minors after age of ḥizānat by mother, father has a right to custody subject to welfare of minor : Although under the Muslim Law, the father is the natural guardian of the minors, and as such entitled to the custody of a son who attains the age of seven years, or a daughter who attains puberty, marking termination of the mother's period of *Hizānat*, yet there may well be very good reasons for denying him that custody consistent with the demands of the welfare of the minor which is the overall determining factor to be kept in view. The paramount and determining consideration in all such cases is the welfare of the minor and not the

rights of the parents, in whose favour an initial but rebuttable presumption can be raised. Therefore where the father had never made any bonafide demands for the custody of the minors (who were living with their mother) either before the application was moved against him under section 488, Criminal Procedure Code, 1898, or even thereafter, he was not entitled to rely on his Muslim law right to custody of his children. [PLD 1968 Kar. 211=20 DIR (W. P.) 104]

Female child given in custody of female relatives, father may get custody of child if it is not in interest of child to remain in custody of female relations : The Muslim Law gives the right of *hizānat* of female minors who have not attained the age of puberty to certain female relatives of theirs, including the mother and the maternal-grandmother in a certain order, but this is also true that according to Muslim Law the father is the natural guardian of his minor children, and that if he makes out a case that it is not in the interest of the welfare of the minors to remain in the custody of such female relatives, he can successfully apply for the children being restored to his actual custody. [PLD 1967 Lah. 382=19 DLR (W. P.) 43].

Maternal-grandmother not entitled to custody of grandson beyond 7 years of age : The grandson being more than twelve years of age, the right of *hizānat* was not at all available to his maternal-grandmother under the Muslim Law. [PLD 1967 Lah. 382=19 DLR (W. P.) 43.]

Minor married girl, mother and not husband has right to custody of girl : According to the Muslim Law, the effect of the contract of marriage is to place the wife under the dominion of the husband, but notwithstanding her marriage, the right to the care and custody of a minor girl belongs not to the husband, but to her mother until she attains the age of puberty. Where the female is a minor and is kept out of the custody of natural guardian against her wishes, such detention is illegal, as it is without the consent of the person who is legally entitled to the custody of the minor. (PLD 1969 Lah. 166—21 DLR (W. P.) 104—PLR 1970 (1) W. P. 979—Law Notes 1969 Lah. 66). Minor girl's mother has a right to her custody till she attains the age of puberty but this right is subject to the welfare of the minor (PLD 1970 Kar. 619).

Minor son, mother has right to custody till son attains 7 years of age, whether entitled to custody after that age, consequences of refusal of mother to hand over custody to father : Under Muslim Law a mother is entitled to keep the custody of her son until he attains the age of seven years. After that his father has a legal right to the custody of his children in preference to the mother. After the attainment of the seven years the

custody of the minor son by the mother immediately becomes unauthorized. The minor would then be presumed to be in the constructive custody of the father and if the mother refused to hand over the children to the father, it would be tantamount to her removing the ward from the custody of father. (PLD 1972 Pesh. 1).

Mother leaving her husband because of maltreatment retains right to custody of her children : In the circumstances the reason given by the respondent that she had left the house of the appellant because he maltreated her appears to be more probable. In leaving the ordinary place of residence of the appellant and taking away with her the two boys the respondent, therefore, did not lose her right of *hizōnat*. If a divorcee could take her minor children to a place outside the city where the father resides, there can be no logic that so long as marriage subsists a wife cannot take the children outside the city of residence of the father, if due to certain circumstances she had to leave her husband's home. The underlying consideration is not the status of the mother, but "a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is an advantage to the child." 20 DLR (S. C.) 1.

Technicalities need not be enforced :

In guardianship proceedings, the Court exercises parental jurisdiction. Technicalities of pleadings or strict formalities need not be enforced. (PLD 1967 Lah. 977; PLD 1972 Pesh).

Conclusion :

The rule of conduct of the Hanafis regarding custody of male child till the age of seven years as compared to shi'i rule of conduct of two years of his age allowed to the mother appears to be more appropriate. The welfare of the minor, particularly his needs also demand it. It is, thus, advisable, if the law is enacted in Pakistan in accordance with the Hanafi rule, as codified hereinabove.

Section 174. In case the mother is not present, or she renounces her right, or is legally held disentitled to the right of custody of her son less than seven years of age and of her daughter who has not attained puberty the same shall vest successively in the female relatives as below :

Right of custody
after mother, of
other relative
women.

Maternal grandmother, (howsoever high in degree),
paternal grandmother (howsoever high in degree), full sister,

uterine sister, (*Akhyafi*), consanguine sister (*Allati*), full sister's daughter, uterine sister's daughter, consanguine sister's daughter's, mother's sister and father's sister.

COMMENTARY

When the child's mother is not alive or her legal right of custody has lapsed because of some reason the question will be who shall then be entitled to the right of custody. There is some difference of opinion among the jurists on this question.

According to Hanafis, in such a case, the right of custody shall vest in the relatives in the following order :

After the mother, the maternal grand-mother howsoever high in degree; there being none in the line of maternal grand-mothers, the paternal grand-mother howsoever high in degree; then the full sister, uterine sister and consanguine sister in that order; thereafter the line of mother's sisters and then the line of father's sisters. Failing all these full sister's daughters and after them full brother's daughters and finally father's sister's daughters.¹⁸

According to Ahmad b. Hanbal as well the female relative in the line of the mother shall have preference over the females in the line of the father. In case of there being none of the above females the line of the sisters in the above referred order shall be entitled to custody. Imāms Mālik and al-Shafi'i too prescribe the same order with some minor difference. However, all are agreed on the point that the women in the line on the mother's side shall have preference as against the women in the line of the father.

Modern Legislation :

There has been some legislation on the subject in several Muslim countries as under :—

Tunisia :

Section 54. *Hīzānat* is for the protection and upbringing of a minor.

Section 55. If a woman refuses to be a custodian of the child she shall not be forced to it except where no one else is available.

Section 56. The expenses of a child given under custody shall be met out of his property if he has any. If he does not, it shall be met out of his

¹⁸Damād Affandi : op. cit. Vol. I p. 481.

father's property. If the woman having custody does not have a house it is incumbent upon the father that alongwith making over the custody of the child he should provide a house for her as well as for the minor.

Section 57. The right of custody of a child, as a matter of right, belongs to his parents during (subsistence of) their wedlock. When the marital relationship, because of divorce or death, terminates between them, the right of custody vests in the following persons successively : Child's mother; child's mother's mother; child's mother's sister; child's mother's mother's sister; child's mother's father's sister; child's father's mother; child's father; child's sister; child's father's sister, child's father's father's sister; child's father's mother's sister; child's brother's daughter; child's sister's daughter; child's executor (*wasi*); child's brother; child's father's father; child's mother's father; child's brother's son; child's father's brother; child's father's brother's son. Similarly of all other degrees, as far as possible, the maternal relatives shall be given preference over paternal relatives. If two relatives be equally eligible for having custody the one who is older in age shall be given preference. Unity of religious faith with the child is a condition for the agnate to be the child's custodian (i.e. the child and its custodian ought to belong to the same religious faith).

Syria :

Section 139. The right of custody belongs to the mother; mother's mother howsoever high; father's mother howsoever high; full sister; uterine sister; consanguine sister; full sister's daughter, consanguine sister's daughter; maternal and paternal aunts in the like order as in inheritance.

Section 140. When there are several persons entitled to be the custodians of the child the *Qōḍi* has the right of selecting the person best suited to guard the interest of the minor.

Section 175. When none of the women eligible to the custody of the minor is available or is not prepared to accept it or her right to it has lapsed, the men in the order of agnate relationship shall, then, become eligible to custody.

Men's right of custody.

COMMENTARY

It is fully established that the right of custody of women is superior as compared to that of men; and the right of custody belongs to men only when there are no women eligible to the right of custody or are not prepared to accept it or their right of custody has lapsed due to some legal

impediment. In such situations the agnate relative, who is superior in entitlement to inheritance, is superior in the entitlement of custody as well; e.g. father, then the grand-father (howsoever high in degree), then full brother, then consanguine brother (*'allāti*), then full brother's issues.¹⁹

Section 176. For the custodian of a child it is incumbent that he be a Muslim, major, wise and capable of bringing up the child properly. There must not be in him such a disability that makes him unfit for receiving custody of the child.

Conditions for
Children's
Custodian.

COMMENTARY

The following qualifications are prescribed for the guardian of a minor. He must be wise, mature, free and not a debauchee. Thus at the time of appointment of a custodian for a girl it has to be borne in mind that of agnates the one so appointed should be honest and trust-worthy. In the event of his being a debauchee or an embezzler he shall not be entitled to being appointed as a custodian. Likewise it is a condition that agnate relative (*'asbah*) should be Muslim.²⁰

All the *Imams* are agreed on these conditions. According to the *Imams*, Malik, al-Shafi'i and Ibn Hanbal, it is also a condition that the custodian of a child must be a Muslim, not an un-Believer. According to the view of the Hanafis, Ibn al-Qasim's and Abu Thawr it is not a necessary condition for the mother of the child to be appointed a guardian that she be a Muslim.²¹

According to the four *Imams*—Abu Hanifa, Malik, al-Shafi'i and Ahmad Ibn Hanbal it is also a condition for the mother that, in the event of her getting a separation from her husband, she must not have married any stranger (a person not within the prohibited degrees of the child) and that she must not have turned apostate. According to Hasan al-Basri, however, it is not a necessary condition. According to him her contracting another marriage with a stranger does not disqualify her for custody.²²

¹⁹Al-Kasani: op. cit. Vol. iii, p. 43; Ibn al-Humām: op. cit. Vol. iii, p. 316; Abul Barkāt: Al-Muharrar fil fiqh, Cairo, Vol. iii, p. 118.

²⁰Al-Kasāni: op. cit. Vol. iii, p. 43; Ibn al-Humam: op. cit. Vol. iii, p. 316.

²¹Ibn al-Qudama al-Maqdisi: Al-Mughnī, Cairo, 1367 (A.H.) Vol. VII p. 616; Ibn al-Humām: op. cit. Vol. iii, p. 405; Damād Affandī: op. cit. Vol. I, p. 581; Al-Kāsāni: op. cit. Vol. iii, p. 481.

²²Ibn al-Qudama Al-Maqdisi: op. cit. Vol. VII, p. 619-20.

All are, however, agreed on the point that contracting marriage by child's mother with a relative who is in the prohibited degree to the child does not make her right of custody lapse. For instance, her contracting marriage with the uncle of the child.²³

Modern Legislation:

There is codified law in force on the subject in several Muslim countries as given below.

Tunisia :

Section 58. It is a condition for the one entitled to be a custodian that he should be answerable in the eyes of Shari'ah, he should be trustworthy, he should have the capability of being a custodian and must be free from any contagious disease. Further, where the person who is entitled to custodianship of a girl is a man, it is essential for him to be geneologically within the prohibited degrees to her. For a woman to be entitled to custodianship it shall be a condition that she should not have re-married a person who is not within the prohibited degrees of the minor or is not a guardian of the girl or the boy to go under her custodianship.

Section 59. If a woman entitled to be a custodian of the minor is different in religion from the father of the minor, her custodianship of that child shall not be valid unless the minor has attained the age of five years. If it is apprehended that the child may feel inclined towards a religion different from the religion of his father, the provisions of this section shall not be applicable to the child's custodian-mother.

Syria :

Section 137. The conditions for custodianship are majority, sanity and the capability of bringing up a child in good health and with sound morals.

Section 177. The mother's preferential right of custodianship shall lapse by her contracting marriage with a stranger who is not in the prohibited degree to the child except when, in the opinion of the court, the minor's welfare lies in the custody of the mother.

Lapse of the
mother's pre-
ferential right

²³Damād Affandi : op. cit. Vol. i, p. 481; Al-Kasani : op. cit. Vol. iii, p. 42; Ibn al-Humām : op. cit. Vol. iii, p. 314.

COMMENTARY

The four Imāms are agreed on the point that if separation between the parents of the child has taken place, mother's right to custodianship shall lapse when she marries a stranger who is not within the prohibited degrees to the child. According to Hasan al-Basri, however, her right to custodianship does not lapse on her contracting a second marriage (in such a case).²⁴

According to al-Shafi'i and according to one view of Ahmad b. Hanbal, as soon as the second marriage is contracted the right of the mother to custodianship of the minor lapses. However according to Malik and according to another assertion of Ahmad b. Hanbal, after the marriage as long as cohabitation with the second husband does not take place the right to custodianship shall not lapse. But the first opinion of Imam Ahmad has always been acted upon that the marriage with a stranger itself deprives her from custodianship.²⁵

Modern Legislation:

The following is the law on the subject in force in Muslim countries.

Tunisia :

Section 25. It is a condition for the one entitled to be a custodian that he should be answerable in the eyes of Shari'ah, and be trustworthy; he should have the capability of being a custodian and he must be free from contagious diseases. Furthermore, when the person who is entitled to custodianship is a man it is essential for his custodianship of a girl that he be geneologically related to her within the prohibited degrees. If a woman is entitled to custodianship it shall be a condition for her that she be free of the husband who has cohabited with her except when the husband is within the prohibited degrees of the girl under her custodianship.

Syria :

Section 168. The marriage contract of a custodian woman with a person who is not the relative within the prohibited degree to the one under her custodianship shall make her right of custodianship lapse.

Section 141. The right of custodianship shall revive when the cause of its lapse is removed.

Pakistan :

There are several judgements of the High Courts available on the question of the lapse of the entitlement to become or remain as guardian of a minor, of a woman who contracts a second marriage with a person stranger to (not within prohibited degree of relationship with) the minor.

²⁴Ibn al-Qudama Al-Maqdisi : op. cit. Vol. vii, p. 619.

²⁵Ibid. p. 620.

They are summarised below as they will be helpful in the understanding of the question.

In the case of *Muhammad Bashir vs. Ghulam Fatima* (PLD 1953 Lah. 73) Mr. Justice Kaikaus has held that the second husband of the mother should be within the prohibited degrees of the minor by consanguinity. The original saying of the Holy Prophet, on which this rule is based, is that a woman loses her right when she marries a stranger.....To say that the second husband comes within prohibited degrees as soon as marriage between him and the mother is consummated will not avail to save the mother's right.

Mr. Justice Kaikaus in the above case has further held that though the mother has a right to *hizānat*, the father is the natural guardian and entitled to exercise control and supervision over the child and if the mother removes the child to a place where the father is unable to exercise his control, the mother loses her right to custody.

The same learned Judge, in another case, *Niaz Bibi vs. Fazl Elahi* (PLD 1953 Lah. 422) has also held that ordinarily a female's right to custody cannot be defeated on the ground of want of funds to maintain the child. The Muhammadan Law does not regard this as a disqualification for a female. We are to presume that the benefit of the minor is in that custody which Muhammadan Law enjoins till the contrary is proved.²⁷

Mr. Justice Akhlaque Husain in the case of *'Amar Elahi vs. Rashida Akhtar* (PLD 1955 Lah. 412) has held that the Muslim Law does not prohibit a mother who has married a person, not related to her minor daughter within the prohibited degrees, from being appointed her guardian under all circumstances.....By marrying a stranger the right is not lost absolutely. She only loses her preferential right to the custody of the child, which means that if there is another relation of the minor who possesses a right under the Muslim Law to the custody of the person of the minor and to whom the welfare of the minor can be safely and properly entrusted, such a female relation cannot claim the custody of the child as of right.

Akhlaque Husain J., in the above case, expressing his opinion that the judgments as reported in A.I.R. 1932 Lah. 493 (*Mehraj Begum vs. Yar Muhammad*), P.L.D. 1952 B.J. 53. (*Ghulam Jannat vs. Bashir Shah and others*) following A.I.R. 1928 Oudh 220 (*Ansar Ahmad vs. Samidan*) do not state the law correctly, observed that a father applying under Section 25, Guardians & Wards Act for restoration of custody of a minor, on the mother's marrying a stranger, will only succeed if it is for the welfare of the minor to return to the custody of her guardian. He further held, "It will be

noticed that the Court is not required, while dealing with an application under Section 25 (of the Guardians & Wards Act, 1925) for the return of the minor to the custody of its guardian, to make an order "consistently with the law to which the minor is subject," as in the case of appointment of guardian. All that the Court has to consider is whether it will be for the welfare of the ward to return to the custody of his guardian."

In an earlier decision of Bagdadual Jadid in the case of *Mst Ghulam Jannat vs Bashir Shah* (P.L.D. 1952 B J., 53), from which Mr. Justice Akhlaque Husain in the above judgement differed it was observed, "It is settled law that under Muhammadan Law a mother who remarries after the death of her first husband, is incompetent to be appointed as guardian of the minor children by her first husband. 1928 Oudh 220 may be referred to in this connection, where it was held that under Muhammadan Law the mother is disqualified from the guardianship even of her minor daughter if she is married to a man who is not related to the minor within the prohibited degrees. It is further observed that where the law definitely lays down that an appointment of a certain guardian cannot be made, it is not proper for the Court to disregard the law even in the interests of the minor".

It has been held in the case of *Ali Akbar vs. Mst. Kaniz Maryam*, (P.L.D. 1956 Lahore p. 484): "If by Muhammadan Law a particular relation is entitled to the custody of a minor we should presume in the absence of proof to the contrary, that the welfare of the minor is in being delivered to that person.

"The minor being over 7 years of age, the right of custody under Muhammadan Law belongs to the father. Not only is there the ordinary presumption of the welfare of the minor, but we have also to keep in mind the strong position of the father with respect to guardianship of the person as well as the property of the child.

"It has to be presumed that the welfare of the minor lies with the father and there should be strong reasons for depriving the appellant of the custody of his child. I have only to consider whether any such reasons exist. It is impossible to hold that if the father, who has divorced the mother of the minor marries again, he forfeits the right to the custody of the minor. I cannot presume that the second wife will ill-treat the child though if the child was made to live with the step mother and she in fact ill-treated him that may be a good ground for an order against the father."

Mr. Justice Muhammad Shafi²⁶ in the case, *Rashida Begum vs. Shahabuddin* (PLD 1960 Lah. 1142) held, "The overall consideration should be the welfare of the minor. The child should not be taken away from the mother if it is in its welfare simply because the mother has remarried a person not related to the minor within the prohibited degrees."

The learned judge observed that : "In this case, the contest is between the mother who has remarried a person not related to the minor girls within the prohibited degree and the paternal uncle of the minors. I have seen the second husband of the mother who is considerably old and very respectable looking fellow. I see no justification whatsoever to snatch the girls from the mother and hand them over to the petitioners whose sons and other relations will certainly not be related to the minors within the prohibited degrees. In the case of the girls it is necessary to see if the person who wants their custody has himself not got boys who may prove dangerous to them. In the case of the father married to another woman, that woman's relations who must certainly visit his house may be absolutely undesirable persons. It should not be forgotten that mother or mother's mother stands in a better position to protect the minor girl from men if they be their husbands than the father or other male relations."

Mr. Justice Inamullah Khan in the case of *Mst. Nazeer Begum vs. Abdul Sattar* reported in P.L.D. 1963 Karachi 465 held : "Under the Muhammadan Law the mother, of all persons, is best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution (Fatawai Alamgiri, Vol. I, P. 728). The right of the mother to the custody of her minor children, in the case of female, until the children attain puberty, cannot be questioned. As I have already mentioned the mother in the present case has lost her legal right of custody of the minor children under the Muslim Law because of her marriage to a stranger. This, however, does not deprive her, if the Court was of the opinion that it would still be to the welfare of the minors, if they remain in the custody of the mother."

Mr. Justice Wahiduddin Ahmad (as he then was) in the case of *Akhtar Ahmad vs. Mst. Hazur Begum* (P.L.D. 1965 Karachi 65), held : The mere fact that the mother has lost the right of Hizanat of the minor child will not finally determine the question of future custody of the child.

²⁶This judgement of late Justice Shafi was probably his last. He was severely criticised by the orthodox circles on his fanciful distortion of Muslim Law, (see Monthly *Tarjuman al-Qur'an*, Lahore, "*Mansaf-i-Risalat*" edition).

This question will have to be decided always in keeping with the interest and welfare of the minor”.

In another case, *Khushi Mohammad vs. Muhammad-un-Nisa* (PLD 1961 Lah. 768), a Division Bench of the High Court of West Pakistan, Lahore, held : “On the premises the crucial point for determination is whether the custody of the children, which the personal law recognises to be the respondent’s right as against the appellant, could be denied to her. The mother under the personal law loses the right to custody of the children if she marries a stranger. She has so married and is, therefore, within the prohibition. There is no doubt that the personal law favours the custody of the minors in the case of a boy till he reaches the age of seven and of a girl before she attains puberty to remain with the mother. The principle is unexceptionable if it advances the welfare of the minor which in all cases remains the primary consideration. Ḥaḍrat ‘Umar (may God be pleased with him) is reported to have divorced his wife who had a minor child. Ḥaḍrat Abū Bakr (may God be pleased with him) stated the rule in the presence of several Companions of the Holy Prophet (God be pleased with them all) that the sticky water which flowed from the mouth of the mother was more invigorating for the child than the purest honey which a father could provide. It merely illustrates the anxiety of our law-givers to provide for the physical and emotional development of the child. At the age of seven, a male child is sufficiently advanced in years to be denied the tender care of the mother and entrusted to the father who is more appropriate to give him the proper training. The mother being better qualified in the case of a minor girl, who has not attained puberty, to train her for the responsibilities of her sex, takes preference over the father. But these are not the only two considerations which are germane to the issue. The moral and spiritual values constitute the life and soul of every religious system and it is only in cases where the physical and emotional development of a standard level could be secured only by the sacrifice of moral and spiritual values that the former considerations yield to the latter. In essence, therefore, the welfare of the child remains the paramount consideration. The rules of personal law in the last analysis resolve in the formulation of those principles which contribute to the maximum welfare of the minor. The normal rules are to be departed from only on the consideration that otherwise it will result in denying the minor a benefit more fundamental in character. And that rule is part and parcel of the personal law itself.

“In the present case, there is no escape from the conclusion that the respondent has been leading a life and chosen for herself an environment in which the minors would constantly be under an influence which has the

inherent danger of impairing their moral and spiritual values. The Courts are always anxious and indeed it is their duty to secure the moral and spiritual development of the minor even though in doing so they have to depart from the normal rules governing the custody of minors. We are, therefore, constrained in the present case to allow the appeal and reversing the order passed by the learned Single Judge, restore that of the learned Guardian Judge. The case will go back to the learned Guardian Judge who will summon the parties and take steps to deliver the minors to the appellant, their father."

The same High Court in the case of *Zohra Begum vs. Latif Ahmad Munawwar* (PLD 1965 Lah. 695) held: "It would be permissible for Courts to differ from the Rule of *Hizanat* stated in the text Books on Muslim Law for there is no Qur'anic or traditional text on the point. Courts which have taken the place of Qazis can, therefore, come to their own conclusions by process of Ijtihad which, according to Imam Al-Shafi'i is included in the doctrine of Qiyas. It has been mentioned earlier that the rule propounded in different Text Books on the subject of *Hizānat* is not uniform. It would, therefore, be permissible to depart from the rule stated therein if, on the facts of a given case, its application is against the welfare of the minor."

In the case of *Zadha Begum vs. Mohammad Nazir Khan* (PLD 1966 AJ&K. 1) where the question was of the mother being deprived of right of custody of her minor children in case she contracts her marriage with a person not within the prohibited degrees, it was held by the Azad Jammi and Kashmir High Court that: "The welfare of the minor is to be adjudged not arbitrarily or according to the sweet will of the Judge but subject to the law to which the minor is subject.....The law presumes that where the legal custody is, there is the greatest welfare of the minor to be placed. The Court is bound by the provisions of law in forming this opinion as to whose custody is best for the welfare of the minor. The occasional dicta, therefore, that the minor's welfare is the paramount consideration, must be understood in the sense that the principle on which the Legislature proceeds, is that the welfare of the minor shall be the paramount consideration and that this fact may be borne in mind in interpreting the words of the enactments. Sometimes, the welfare of the minor clearly points who should be selected as the guardian and in the confidence that the ultimate object of the law is minor's welfare. The dicta must be with the reservation that the judges cannot set their own views above those of the legislature and if the law does lay down that a certain person is entitled to the custody of the child, the Courts are bound to give effect to the manner in which the law requires it to be safe-guarded, for the Courts cannot put their own

ideas of what is deemed to be the welfare of the minor above the behest of the Legislature. Where the law leaves a discretion to the Judge, that discretion of course will be exercised primarily with the object of promoting the welfare of the minor in accordance with Judge's understanding; but in doing so the Judge acts in accordance with the law by which the minor is governed which requires the Judge to exercise his own discretion."

In an earlier case of *Mst. Fatima Bibi Vs. Khushia* (PLD 1952 Azad J. & K. p. 6), it was held, "The important question in this case was whether it was necessary to appoint any person as guardian of the minor and this was altogether overlooked by the learned District Judge. Under Section 17 of the Guardians and Wards Act, it is open to the Court to appoint a guardian if it is considered that the appointment will be for the welfare of the minor and it is decided that a guardian should be appointed. Then the Court is restricted in the choice of the guardian by the provisions of section 17 and an appointment must under that section be consistent with the law to which the minor is subject. If the mother were petitioner on one hand and the grandfather on the other hand and both of them desired to be appointed guardian of the person of the minor, then certainly the grandfather would be in a position to defeat the mother, the latter having lost her right for the custody of the minor owing to her remarriage with a stranger."

In the case of *Bevi vs. Shah Nawaz Khan* (PLD 1961 Lah. 509) Mr. Justice Jamil Hussain Rizvi, a Judge of the High Court of West Pakistan, Lahore, observed "Under Muhammadan Law, a mother is entitled to the *hizānat* of her daughter till she attained puberty and of her son till he attained the age of seven years. She does not lose her right to the custody of her children merely because she lived separately from her husband. The principle of Muhammadan Law as regards *hizānat* is fundamentally based on this fact that it is for the welfare of the minors to live with their guardians as directed under the law.....If the relations of husband and wife are strained and as a result of that they live separately, the wife would not lose the *hizānat* of her children during the period the law permits her to keep them."

Mr. Justice Anwar-ul-Haq, then Judge of the High Court of West Pakistan, Lahore (now Chief Justice, Supreme Court of Pakistan), in the case of *Mohammad Sadiq vs. Mrs. Sadiq Safoora*, (PLD 1963 Lah. 534) held: "A Muslim father is the legal and the natural guardian of his children until they attain the age of majority under the general law of the land, namely, Majority Act, 1875 i.e., 18 years. The mother has the right of custody or *Hizānat* upto the age of seven years in the case of male child, and upto the age of puberty, i.e. 15 years, in the case of a female child. Even during

this period, the right of Hizānat or custody is to be exercised under the supervision and control of the father, who is responsible for the maintenance of the children. The father has always to be regarded as having the constructive custody of his children, although the actual or physical custody may be with the mother or some other female relative, or some other person nominated by the father."

Mother of minors marrying stranger may be given custody of minors in preference to paternal-aunt, welfare of minors is supreme consideration: The application of mother for appointment as guardian of person and property of the minor son was contested by the paternal-aunt and a distant paternal-uncle of the minor on the plea that the applicant mother after the death of the father of the minor had married a stranger not within the prohibited degrees of the minor. The record indicated that the paternal aunt and the paternal-uncle were enjoying the usufructs of the minor's property but the stranger husband of the applicant mother on the other hand was a person of affluent circumstances and had neither any other wife nor any other issue. Therefore, she could be appointed guardian of the minors in preference to paternal relations. (PLD 1971 Dacca 24-22 DLR 608).

By marriage to stranger the right is lost: By the marriage of the mother to stranger, her right to the custody of her children is lost and in that case the grandmother has preferential right to their custody. (1969 P. Cr. LJ, 109).

Mother marrying stranger, father has right of custody of daughter aged 6 years: The mother having re-married a stranger not within the prohibited degrees to the minor, loses her right to the custody of her minor daughter and the father becomes entitled to the custody of such minor daughter even though she is about 6 years of age. (PLD 1966 Azad J & K 1).

Remarriage of mother not always sufficient ground for depriving her of custody of minor: Ordinarily a divorced mother of a minor daughter retains the right to her custody (*hizānat*) until she has attained puberty unless the mother marries a second husband in which case the custody belongs to the father. But the principle is not absolute and can be departed from if there are exceptional circumstances to justify a departure from that rule. In matters like this, the policy of the Courts, generally has been not so much to be nice in defining the legal rights of the disputing parties, who are claiming custody of minors as to put prominently before them the welfare of the minors which plainly is the paramount and determining consideration. The Court thus refused to give custody of the minor to her father who had also taken another wife and because it would have been cruel to the minor. [PLD 1967 Lah. 333-19 DLR (WP) 29.]

The right of any person, whether a female including the mother or a male, to the custody of a minor is a preferential right. The Muslim Personal Law does not seem to indicate that a female by losing the aforesaid preferential right due to her re-marriage with a stranger becomes absolutely disqualified to be appointed as the guardian of a minor. The alteration that is brought about in the situation by the marriage of a female, entitled to the custody of the minor, with a stranger is that the right of the female below takes precedence over that of the former and failing the one below and all others following her, the custody appertains to the male relations. If none of the male relations is available or is not found fit for the custody, the texts of Muslim Personal Law do not seem to warrant any conclusion that the particular female whose preferential right has been lost because of her marriage with a stranger, cannot be appointed the guardian if she yet be the most suitable of all persons for appointment, the dominant consideration always being the welfare of the minor. (PLD 1971 Dacca 24-22 DLR 608).

Conclusion :

The view point of our courts that in the matter of custodianship 'the welfare' of the minor is the decisive factor is quite in accord with the 'Islamic law', but in this connection it must be borne in mind that the decision about the 'welfare' of a child cannot be left to the subjective approach of the judge. His decision should be made objectively, and for the decision to be made objectively the rules of Islamic law shall have to be observed, because admittedly the application of Islamic rules of law is in the interest of the child; except when the circumstances of the case demand the substitution of one rule of Islamic law by adopting another rule of Islamic law (i.e. the view point of the welfare of the child). For instance, there is a rule of Islamic law that a woman's contracting second marriage with a stranger who is not related to the child within the prohibited degrees shall be the cause of her being deprived of her right of custodianship; but there is another rule of Islamic law that "the basis of the custodianship is welfare of the children." Hence if the court, in the circumstances of the case, arrives at the conclusion that in following the second rule the first rule of law be over-looked, the court's action shall thus be in accord with the Islamic principles of law. Therefore, the ratio decidendi in the various judgements of our courts has been that in the circumstances of a case if the welfare of a child rests with the mother the child should live with his mother and merely the fact of the mother's contracting a second marriage with a stranger shall not make her right of custodianship lapse appears to be correct. Rather this point of view is supported by the verdict of several Muslim Jurists. Ibn Ābidin,²⁷ for example, discussing the matter in the chapter on "*ḥiḍḡanat*" in his authoritative work, Radd al-Muhtar writes :—

²⁷Ibn 'Abidin : Radd al-Muhtar, Bulaq, Cairo, Vol. ii, p. 694,

“If a woman having custody of a child lives, boards and dines separate from her husband and the son lives with that woman she then has not the right of custodianship of that child, as the husband has no access either to the woman or to the child. As against this when she is under care of a husband who is stranger to the child or the second husband has another wife as well, the child shall be taken out of her custody”.

The deprivation of mother's right of custodianship in the event of her marrying a stranger is with the purpose of preventing injury to the welfare of the minor. The judge, therefore, must use his insight and must keep in view the welfare of the child for (there may be cases when) some times, the child's close relatives are hostile to him and wish him not to survive. Some-times his mother's (stranger) husband has more love for the child and his separation from him may be injurious to him (the child) ; sometimes, the close relative's interest to take the child is with the purpose of putting him and his mother into distress or he intends to take the child (with himself) with the purpose of living on child's property or to draw benefits out of him; sometimes the (second) wife of the husband helps the child twice as much as he does and sometimes a close relative has issues who because of living together become the cause of harassment for girl-child. When a judge or a Qādi becomes aware of these things it is not lawful for him to get the child out of the custodianship of the mother because the fact of custodianship is based on the welfare of the child.”

Suggestion :

In Pakistan, the “Guardians and Wards Act, 1925” is in force. But this law does not fulfil the social needs of a Muslim society growing in various dimensions. The deficiency to a certain extent has been made up by the decisions of our courts, but it seems opportune to mention here that in the light of the courts' decisions and with the help of the law relating to *ḥiḍānat* current in other Muslim countries, detailed references from which have been given in this chapter, entirely fresh legislation shall help in the removal of the most of the confusion prevailing in the present day Muslim social life caused by legislation not based on Islamic principles. The author has, as far as possible, kept in view this aspect while codifying those principles in this chapter. The principle, “The basis of *ḥiḍānat* is the child's welfare” and the rule, “Woman's marriage contract with a stranger makes her right of custodianship lapse” both, in the circumstances of each case, are true by themselves, but they have obviously to be applied with reference to the special circumstances of each case.

CHAPTER XXV

Law of Maintenance of Children, Parents and Relatives

Section 178. A father, according to his means, is responsible for the maintenance of his sons till they attain the age of majority and of his daughters till they are contracted into marriage.

Responsibility of
maintenance of
children.

COMMENTARY

In Arabia prior to Islam, parents were not held responsible for the maintenance of their children. Particularly daughters were considered as bringing ill luck and were buried alive. Islam lays stress on the dignity of human soul; it formulates rules for the protection of human lives. Islam, therefore, holds the maintaining of one's family as good as divine worship. Abu Mas'ud Ansari reports a tradition from the Prophet that he said, "When a Muslim spends on his wife and children considering the same as an act of piety it turns into supererogatory offering by him". That is, he becomes entitled to a reward in the world hereafter for the supererogatory offering.

The maintenance of a minor child is incumbent only upon the father, no one else shares it with him; as no one shares with him in the maintenance of his wife.¹ But the maintenance of a child shall be incumbent upon the father when the child has no property of his own. If the child possesses property he should be maintained out of his own property. The minor can have his own property by his acquisition of it from someone through inheritance or through gift made by someone in his favour. It is stated in the noted work on fiqh, *Al-Fatawa al-Zahiriyyah*, that if the minor child possesses land or clothes (more than his requirement) and if the same is required for his maintenance it may be sold by the father who as guardian is entitled to sell it and spend the sale-proceeds on the maintenance of the child.²

¹Al-Marghinani, Burhan al-Din : *Al-Hidayōh*, Qur'ān Maḥal, Karachi vol. ii, p. 442.

²Ibid p. 445.

The responsibility of the father for the maintenance of his children is unconditional and absolute.³ The father cannot escape from his responsibility⁴ merely on the ground of his children being disobedient or that they are under the custody of their mother. According to Shari'ah it is the bounden duty of the father to maintain his sons till they attain the age of majority and the daughters till they are contracted into marriage. If the children are themselves possessed of property and they can be maintained from it, the father shall not be responsible for their maintenance.⁵ For the sons the age of majority is fifteen years under the law of Shari'ah except when they attain puberty before that age. The majority Act, 1875 does not apply to a father's responsibility for the maintenance of his children in determining the age of majority.

Mr. Roland Wilson has in his book, "Anglo Muhammadan-Law"⁶ said that maintenance is not included in the matters that have been excepted from the application of the majority Act. Hence, according to him, the responsibility of maintenance remains till the children attain the age of eighteen years. But this view does not appear to be correct, because the Majority Act does not enlarge the period of the continuation of rights and their corresponding obligations. Hence Muslim sons have no right to get maintenance from their father after attaining majority under the Shari'ah, nor does the maintenance, after their attaining this age, remain due on the father except where because of some physical defect or illness they are not capable to earn their own livelihood.

The general principle is that providing of maintenance is not incumbent upon one who is himself needy. Its incidence on one is by way of a compassionate liability but a needy one is himself entitled to others' compassion. Hence maintenance cannot be due from him. This general principle, however, is not applicable in the case of maintenance of a wife and of minor children. The maintenance of wife and minor children, inspite of the husband and the father being poor, is incumbent upon them.

³Ibn al-Humām : *Fath al-Qadīr*, Cario, 1356 (A. H.), vol. iii, p. 344.

⁴Ibid.

⁵*Sughra Begum v. Muhammad Yunus* PLD 1957 Lah, 341; Ibn al-Humām : *Fath al-Qadīr*, Cairo, 1356 (A.H.), vol. iii, p. 344; Al-Sarakhsī, Shams al-Dīn : *Al-Mabsūt*, Cairo, 1324 (A.H.), vol. v, p. 185.

⁶Sec. 140, 142.

The standard of affluence as against indigence is stated from Abu Yūsuf to be that a person must be possessed of minimum quantity of property on which one is liable to pay *zakāt*. In other words, his accepting *zakāt* himself be forbidden to him. A reported opinion of Imām Muhammad Al-Shaybāni is that affluence can be gauged from the fact that a person is able to save some thing over and above at least a month's expenses of himself and his family or is able to save something from his permanent income; only then maintenance of destitute relatives shall become incumbent upon him otherwise not. In rendering people their rights, reliance is placed on one's capability only, not on the minimum quantity of property on which *zakāt* is due, because that is a measure for the rich only. General practice is, however, based on the verdict of Abū Yūsuf, which is to the effect that when property of a man is more than his requirements to such an extent that it becomes incumbent of him to pay *zakāt*, only then maintenance of his destitute relatives shall become incumbent upon him.

When a judge (*Qāḍī*) orders a man to provide maintenance for his sons, parents and close relations but he defaults in such payments the dues for that period shall lapse; because the maintenance for sons, parents or relatives has been made incumbent with the purpose of meeting their requirements. But the maintenance for the wife specially when it is fixed by a *Qāḍī* does not lapse in as much as providing maintenance, inspite of the wife being affluent, is obligatory upon the husband. The maintenance of the wife is really a compensation for surrendering herself to her husband.

Pakistan Ruling :

The Lahore High Court in a case held "where the child was maintained by the mother who did not contract a second marriage after the death of her husband and maintained the child during the period of *Hizanat* when she had obviously the right to his custody, the grandfather cannot escape the liability for payment of part maintenance." [PLD 1971 Lah. 171 (DB)].

Section 179. A father is responsible for the maintenance of his legitimate children only.

Legitimacy and
maintenance of
children.

COMMENTARY

The father is responsible for the maintenance of his legitimate children only. The responsibility of maintaining his illegitimate children does not rest on him.

Under Section 488 of Criminal Procedure Code, 1898, however, the father may be compelled to provide maintenance for his illegitimate children.⁷ On his failure to pay the same he may be sentenced to imprisonment too. If a child is illegitimate, according to the same provision, the father has no right to refuse the payment of the maintenance allowance merely on the ground that the mother refuses to hand over the child to him. Section 488 (7) reads thus :

“If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or *illegitimate* child unable to maintain itself, the District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding four hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time direct,

Suggestion :

According to the *Shari'ah* the father is not responsible for the maintenance of illegitimate children; whereas under the Pakistan law, referred to above, he is held responsible for it. It is necessary that the said provision of law in Section 488 of the Criminal Procedure Code, 1898 be amended and the words relating to the applicability of the Section to illegitimate children be deleted. It would, as against the law in force, discourage if not altogether eliminate, illicit relations and a whole class of cases such relationship could give rise to.

Section 180. (1) In case the father is poor, the responsibility for the maintenance of children lies with the mother provided she is capable of bearing it.

Responsibility of
mother & grand-
father

(2) in case the parents are poor the responsibility for the maintenance of children lies with the grandfather.

COMMENTARY

In case the father is poor the responsibility for the maintenance of his children, when they have no property of their own, gets transferred to their mother and in case she too is poor, it is transferred to their grandfather. Hence the court, in case the father is poor, is competent to order the mother and in case the mother is also poor, to order the grandfather to make arrangement for the maintenance of the children. But the responsibility of the mother and grandfather is not unconditional

and absolute as it is that of the father. As soon as the father's financial conditions improve and he becomes able to bear the expenses of his children's maintenance, his responsibility shall revive and he shall become responsible to provide for his children.

If the husband of a woman disappears and there is no property of the father, of the children or of the mother, the latter may, according to her needs and custom, borrow in the name of her children's father for the purpose of meeting the expenses of the necessities of the children.

Section 181. Maintenance of needy parents and grand parents
Maintenance of parents is incumbent upon their children notwithstanding that they may not be their co-religionists.

COMMENTARY

It is incumbent upon the major children that they provide maintenance to their parents, grand-parents when they are needy; they may or may not be their co-religionists. This provision is deduced from the Qur'ānic verse "Bear them company in this life with justice (and consideration)".⁷ The verse was revealed concerning such mothers and fathers who were infidels. Living with them according to norms of good behaviour means that the offspring themselves may not enjoy the bounties of Allāh and leave their fathers and forefathers to die of starvation. The basis for the responsibility of maintenance of grandfather and grandmother is the same as that of the father and the mother; because in the absence of father, the grandfather takes this place. The grandparents too are the cause of the children's coming into existence and have the same rights over them (the grand children) as is the case with their own parents.

Islamic law fixes the responsibility for the maintenance of fore-fathers on their grand children on the condition of their being in want. Because if they are in affluence it is proper that they be maintained out of their own property.

So far as the difference of religion is concerned it is no impediment to the obligations of maintenance as is clear from the above noted Qur'ānic verse which establishes the rule that parents either Muslims or infidels have been ordered to be treated according to the norms of good behaviour. If, however, they belong to a group of such infidels who wage war against the Muslims, their maintenance shall not be obligatory upon their Muslim

⁷ Al-Qur'ān ; S. xxi : 15 :

”وصاحبهما في الدنيا معروفاً“

children because those who fight Muslims only on account of their religion, whoever they may be, it is forbidden to show kindness to them.⁸

No one shall be joined with the son in his providing maintenance to his parents. That is, if the parents have a son and he is in a position to provide maintenance for them the Qāḍī cannot order that other relatives to provide the maintenance jointly with the son. The maintenance shall be provided solely by the son. The Prophet (peace be him) with respect to parents' right in the property of his son has said, "you and your property both are for your father." Firstly, a father can have no right in the property of others. Secondly, a son is closest to parents. According to Zāhirīs, (the Literalists), the parents in want have equal entitlement of getting maintenance from both the sons and daughters as the basic cause of relationship is shared by both of them. Al-Sarakhsi in his noted work, "*Al-Mabsūr*" has reported an opinion from Imam Abū Hanifah that like in inheritance the son and daughter ought to contribute 2/3 and 1/3 respectively of the maintenance expenses of their father. The *fatwā* (verdict) is, however, based on *Zāhir al Riwayat*.⁹

Section 182. It is obligatory upon Muslims to provide maintenance to their needy relatives from whom they would inherit according to the rules of inheritance.

Maintenance of other relatives

COMMENTARY

Maintenance and inheritance go together. Hence those between whom the right of inheritance would be created acquire mutual obligation of maintenance as well. It is, therefore, not incumbent upon a Muslim to provide maintenance to a non-Muslim brother, because a non-Muslim gets no inheritance from a Muslim.¹⁰

It is incumbent to provide maintenance to all the relatives within the prohibited degrees when they are needy, poor, crippled or blind. Showing kindness to near relatives is also obligatory. The relative who is within the prohibited degree (with whom contracting marriage is permanently forbidden) is necessarily a near one. Providing maintenance to distant relatives, however, is not incumbent.

⁸Ibn al-Humām : op. cit., vol. iii, p. 347; Ibn al-Nujaym : *Baḥr al-Rā'iq*, Cairo, 1311, (A.H.), vol. iii, p. 223.

⁹Ibn al-Humām : op. cit., vol. iii, 348. Ibn al-Nujaym : op. cit., vol. iii, pp. 223, 224.

¹⁰Ibid;

God in the Qur'ān says "An heir shall be chargeable in the same way."^{10a} In other words, rights and obligations are complementary. In whatever degree a relative has the right the same is the degree of his responsibility.

Al-Quduri in his book, "*Al-Mukhtasar*" says that obligation of maintenance depends upon the share of inheritance. The word "*Wārith*" (heir) in the above verse conveys a warning that the share of inheritance is to be the basis because one should bear a burden according to his circumstances. That is, one would be burdened with maintenance in proportion to the share which he would be entitled to get as inheritance.

The relatives other than those specified, even though they be within permanently prohibited degree, shall, if they are non-Muslims be disentitled to maintenance because the capacity of being heir to each other is lost; whereas maintenance depends on the right of inheritance.¹¹

Modern Legislation :

The relevant provisions of law as enacted in several Muslim countries in their respective *Qānun Al-Ahwāl al-Shakhshiyyah* are given as under:—

Iraq :

Section 58. Maintenance of every person is provided from his own property except that of the wife, whose maintenance is the (personal) responsibility of her husband.

Section 59. (1) In the event of there being no property of the son, his maintenance is to be provided by the father when he (the father) is not poor or incapable of earning his livelihood.

(2) The (obligation of) maintenance of children shall continue, in case of a daughter, till she is not married; and in case of son till others of like age are incapable of earning their livelihood, unless he is a student.

Section 60. (1) When the father is incapable of maintaining his children, the maintenance shall be incumbent upon that person on whom it would have been incumbent in the absence of the father.

^{10a}. Al-Qur'ān : S. ii ; 233.

”على الوارث مثل ذلك“

¹¹ Ibn al-Humām : *Fath al-Qadīr*, vol, iii, p. 350; Ibn al-Nujaym : op cit. vol. iii, p. 228.

(2) On providing maintenance in such circumstances, whatever is spent on such maintenance shall be deemed to be a loan to the father. After the father recovers affluence he shall be made to pay back the said loan to the person who provided maintenance to his children in times of need.

Section 61. Maintenance of poor and needy parents is incumbent upon the son, whether major or minor, having financial capacity in spite of the father being capable of earning livelihood, unless it appears that he is unreasonably taking to laziness.

Section 62. Maintenance of every person who is incapable of earning his livelihood is incumbent upon his such relatives, who are heirs (to him) and to the extent of their shares in inheritance provided they have (such) financial capacity.

Section 63. Orders shall be passed for providing maintenance to relatives from the date of the institution of the claim made to the Court.]

Syria :

Section 154. Maintenance of every person is provided from his own property but that of the wife is (to be) provided by her husband.

Section 155. (1) If a child has no property, providing him maintenance is the responsibility of his father except when the father is himself incapable of providing maintenance and is unable to earn (his own) livelihood because of his physical or mental disability.

(2) Maintenance of children shall continue, in case of a daughter, till she is contracted in marriage and in case of a son till other boys like him are capable of earning their livelihood.

Section 156. (1) When the father is incapable of providing maintenance though he, in fact, may not be incapable of earning his livelihood, the responsibility of maintenance of children shall be of that person who would have been responsible for it in the absence of the father.

(2) Money spent by such person on maintenance shall be a loan to the father. After the father gains affluence he shall be made to pay back the loan to that person.

Section 157. (1) Providing maintenance to the wife of the son shall not be incumbent upon the father of the son when he (the son) is affluent.

(2) Father's spending over maintenance of his major son being in poverty, shall be a loan to that son till he becomes affluent.

Section 158. The children, who are affluent, whether they are sons or daughters and whether they are majors or minors are bound to provide maintenance to their needy parents, although the parents may have the capacity of earning as long as indolence and laziness in the matter of earning livelihood, as compared to other persons like him is not found in them.

Section 159. Maintenance of a person who is poor or is unable to earn (for himself) because of his physical or mental disability, is incumbent upon that affluent person who is heir to him to the extent of his share in the inheritance.

Section 160. Because of difference in religious faith maintenance does not become incumbent except in the case of father, forefathers and the offsprings.

Section 161. Maintenance to relatives shall be decreed to be provided from the date of the institution of claim (i. e. from the date on which plaint is filed in the Court.)

Tunisia ;

Section 43. Because of affinity there are two kinds of relatives entitled to be provided with maintenance : (i) father and grandfather, howsoever high in degree, and (ii) legitimate children however low in degree.

Section 44. It is incumbent upon the son and affluent children, whether male or female to provide maintenance to their needy parents, grandfather and grandmother.

Section 45. If the children be more than one, maintenance shall be provided by the one who is affluent and not individually by every one of them, nor shall it be provided on the basis of inheritance.

Section 46. Maintenance of children howsoever low in degree, who are minors and are incapable of earning their livelihood, is incumbent upon their father (and grandfather) howsoever high in degree. Maintenance of woman shall be obligatory till her maintenance becomes incumbent upon her husband; and the maintenance of daughter is incumbent till she has not attained the age of sixteen years and is incapable of earning her livelihood.

Section 47. In case of a father being in poverty the responsibility of the mother for the maintenance of her children is prior to that of the grandfather.

Section 48. If a mother is incapable of nursing her child at her breast it is incumbent upon the father to make a substitute arrangement for the suckling of the child according to the custom.

Section 49. A person who takes upon himself the responsibility of maintaining a stranger, either major or minor, for a fixed period, he is bound to carry it out. If the period is not fixed and he himself fixes it his words about it shall be relied upon.

Section 50. Food, dress, house, education and such other things that are by custom considered to be essential shall be included in the maintenance.

Section 51. Maintenance, when its cause disappears, lapses, and whatever is realised from the one providing maintenance under lapsed obligation and without cause, shall be returned back to him.

Section 52. Maintenance shall be fixed according to the status of its provider, condition of its receiver and the prices prevailing at the time.

Section 54. If there are more than one persons entitled to get maintenance and the provider of maintenance does not have the capacity of providing maintenance to all of them, the maintenance of wife shall have preference over that of children and the maintenance of minor children shall have preference over that of the parents.

Jordan :

Section 65. (c) A son whose maintenance is incumbent upon his father, the expenses of his education as well, like his maintenance, are incumbent upon the father. Quest for learning is one of the factors on the basis of which maintenance of a child becomes incumbent upon his father. All quests for learning are equal, be they for primary, secondary or higher ones (university education). The fixation of standard of education of a child shall be made in accordance with his understanding, capacity, and his father's affluence or poverty.

(d) If the father is poor and cannot pay a doctor's fee for the treatment of his child, or meet the expenses of his child's education, the mother if she is affluent and has the capacity of bearing such expenses shall meet those expenses and the same would be, like maintenance, an obligation upon the father as debt, which would be recoverable by her when he is in affluent. Same shall be the situation in the absence of the father (when there is no property for the maintenance of his child).

Suggestion :

There is no statute concerning maintenance of Muslim children or their parents and forefathers. Indeed the law of maintenance is being administered in our Courts on the principles drawn from books of *fiqh*. It is, however, necessary that a law on this subject be enacted on the pattern of laws drawn up here in this code. In this connection assistance may also be obtained from the current laws in Muslim countries referred to above.

By the grace of Allāh, Volume One of the Code is now complete; Volume Two, on the laws of Gift, Waqf, Will and Inheritance will, *Insha Allah*, be published early.

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